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# "Free My Agent": Legal Implications of Professional Athletes' Self-Representation

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## **“FREE MY AGENT”: LEGAL IMPLICATIONS OF PROFESSIONAL ATHLETES’ SELF-REPRESENTATION**

**Jodi S. Balsam<sup>†</sup>**

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**VI. CONCLUSION..... 548****ABSTRACT**

*An increasing number of professional athletes have decided to cut ties with sports agents and represent themselves in player contract negotiations. In the setting of a professional sports league, with a unionized workforce that operates under standard player contracts, what sports agents can offer in contract negotiations is necessarily limited. The player unions themselves recognize this by limiting what sports agents may earn as a contract advisor. The phenomenon of players self-negotiating their contracts has legal implications for the broader sports industry, which this article describes and analyzes, including: Is a new paradigm emerging in which player contract negotiations will more frequently involve self-represented players, and what is feeding it? What complementary services and service providers will fill the gap as more athletes represent themselves in player contract negotiations? What should the role of player unions be in supporting self-represented players in contract negotiations? What are the obligations of professional leagues, teams, and their lawyers who find themselves negotiating with self-represented players? And what, if anything, can sports agents do to adapt to this new paradigm and reconceive their relationships with professional athletes?*

**I. INTRODUCTION**

When Russell Okung, offensive tackle for the Seattle Seahawks, was in the last year of his contract with the team, he announced that when his contract expired in 2016 he would “free my agent”—that is, negotiate his own player contract.<sup>1</sup> After five years in the National Football League (NFL), Okung had confidence that he understood the business and his worth in the market. From his perspective, an agent no longer added enough value to justify the NFL standard three percent commission paid to “contract advisors.”<sup>2</sup> Where special expertise might be useful—for example, reviewing the fine print of his next contract—Okung planned to hire a lawyer at a billing rate not

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<sup>1</sup> Russell Okung, *Betting on Myself*, THE PLAYER TRIBUNE (July 20, 2015), <http://www.theplayertribune.com/russell-okung-seahawks-agents-in-sports/> (last visited May 1, 2016).

<sup>2</sup> NFLPA Regulations Governing Contract Advisors § 4 (June 2012) [hereinafter NFLPA Regulations].

linked to playing salary.<sup>3</sup>

Okung was only the latest in a steady stream of professional athletes who have decided to cut ties with sports agents.<sup>4</sup> In the setting of a professional sports league, with a unionized workforce that operates under standard player contracts, services offered by sports agents in contract negotiations are necessarily limited.<sup>5</sup> The player unions themselves recognize this by limiting what sports agents may earn as a contract advisor.<sup>6</sup> The NFL Players Association (NFLPA) has gone a step further in supporting players who shed their agents by supplying information on comparable player contracts, economic analysis of those contracts, and legal advice on contract language.<sup>7</sup> Similarly, other service providers offer adjunct services to athletes negotiating on their own behalf but still in need of certain forms of expertise, including legal, financial, and marketing.<sup>8</sup>

Whether or not Okung's declaration is a bellwether for the sports agent business, these developments have legal implications for the broader sports industry. This article does not seek to make normative judgments about the presence of a sports agent in player contract negotiations, but rather, describes and responds to the phenomenon of "freeing my agent." Questions raised include: Is a new paradigm emerging in which player contract negotiations will more frequently

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<sup>3</sup> See Okung, *supra* note 1.

<sup>4</sup> See William Rothstein, *The Business of Sports Representation: Agent Evolution in the "Industry,"* 9 VA. SPORTS & ENT. L.J. 19, 39 (2009) (listing professional athletes who do not use agents, including Alex Rodriguez, LeBron James, Grant Hill, Ray Allen, Tim Duncan, and Raghieb Ismail); *see also* Jason Belzer, *Do Professional Athletes Need to be Represented by Sports Agents?*, FORBES (July 27, 2015), <http://www.forbes.com/sites/jasonbelzer/2015/07/27/do-professional-athletes-need-to-be-represented-by-sports-agents/#709f39d66aa8> (last visited May 1, 2016) (Ereck Flowers); Billy Stephens, *Do You Really Need an Agent? Part I*, SPORTS MONEY (Aug. 3, 2013), <http://sportsmoney.com/do-you-really-need-an-agent-part-1/> (last visited May 1, 2016) (Matt Elam, Ricky Williams, Alexander Ovechkin).

<sup>5</sup> See, e.g., NFLPA Regulations, *supra* note 2, at 11–12.

<sup>6</sup> *Id.*

<sup>7</sup> Tom Pelissero, *NFL Players Mull Freeing Agents from Future Contract Negotiations*, USA TODAY SPORTS (July 21, 2015), <http://www.usatoday.com/story/sports/nfl/2015/07/21/nflpa-union-contracts-no-agents-russell-okung-rashad-jennings-eric-winston/30490459/> (last visited May 1, 2016). An emerging resource for athletes in minor and foreign sports leagues are online sports recruitment networks similar to LinkedIn, where teams can scout for free agent talent.; *See also* Nadine Skoczylas, *Can a LinkedIn for Athletes Ever Replace Sports Agents?*, BLOOMBERG BUSINESS (July 24, 2015), <http://www.bloomberg.com/news/articles/2015-07-24/can-a-linkedin-for-athletes-ever-replace-sports-agents> (last visited May 1, 2016).

<sup>8</sup> See Rothstein, *supra* note 4, at 38–41.

involve self-represented players? If so, what are the underlying reasons and practical consequences? What complementary services and service providers will fill the gap as more athletes represent themselves in player contract negotiations? What role should player unions have in supporting self-represented players in contract negotiations? What are the obligations of professional leagues, teams, and their lawyers who find themselves negotiating with self-represented players? Finally, what, if anything, can sports agents do to adapt to the new paradigm and reconceive their relationships with professional athletes?

This article lays the groundwork for anticipating and analyzing the issues and challenges likely to arise as more professional athletes represent themselves in player contract negotiations. Part II recounts the trajectory of the sports agent business and reports on the signal episodes in which professional athletes have cut ties with agents, focusing on the athletes' motivations and objectives, and the extent to which such episodes are situational or herald a new paradigm. Part III describes the still-shifting responses to player self-representation, including support and resources offered by player associations, and alternative models of player representation offered by traditional law firms, financial advisors and institutions, and marketing and media relations firms. Part IV addresses potential ethical concerns for lawyers representing teams and leagues in negotiations with self-represented athletes, and how to comply with professional conduct rules in that setting. Part V revisits the role of traditional sports agents and how they might reconfigure their service model to remain competitive in the changing environment and create value for players. In sum, this article aspires to be a resource for athletes, agents, and the constellation of other professionals who interact with them as the player-representation service model evolves.

## II. PROFESSIONAL ATHLETES OPTING FOR SELF-REPRESENTATION

The sports agent business is at a crossroads as more athletes opt to represent themselves in player contract negotiations or uncouple agent fees from player salary.<sup>9</sup> To understand why this is happening, it is

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<sup>9</sup> Nick Bove, *Athletes without Agents*, WEEI 93.7 BLOG NETWORK (June 2, 2010), <http://mashup.vee.com/sports/2010/06/02/leeinks-list-athletes-without-agents> (last visited May 1, 2016); Nick Powell, *Giants' Union Rep Rashad Jennings Pushing for Players to Negotiate Their Own Contracts*, NJ ADVANCE MEDIA (July 23, 2015), [http://www.nj.com/giants/index.ssf/2015/07/giants\\_union\\_rep\\_rashad\\_jennings\\_approves\\_of\\_playe.html](http://www.nj.com/giants/index.ssf/2015/07/giants_union_rep_rashad_jennings_approves_of_playe.html) (last visited May 1, 2016); Jesse Reed, *Examining Pitfalls of Negotiating NFL Contracts without an Agent*, SPORTSNAUT (July 2015), <http://sportsnaut.com/2015/07/examining-pitfalls-of-negotiating-nfl-contracts->

*continued . . .*

first necessary to briefly recount the trajectory of the sports agent business and developments in the world of professional sports that have had a deep impact on sports agents. This Part also describes the typical career path of the professional athlete in economic terms. This discussion sets the stage for scrutinizing recent episodes in which players have shed their agents, to identify the environmental factors and motivations that led them to self-representation.

### A. The Evolution of the Sports Agent Business

For most of the history of professional sports, from the founding of the first professional baseball league in 1876 through the 1960s, the vast majority of athletes represented themselves in negotiating their player contracts.<sup>10</sup> This was largely the byproduct of the industry norm that a club “owned” a player it had introduced to the major leagues and controlled his career from that point forward.<sup>11</sup> Thus, using a negotiating agent would not have improved the player’s lot in any meaningful way, creating little incentive to retain and pay such an agent.<sup>12</sup> Indeed, many teams refused to deal directly with sports agents in salary negotiations.<sup>13</sup>

By the 1970s, four dramatic developments in professional sports gave agents a foothold.<sup>14</sup> First, free agency allowed veteran players to sell their services on the open market.<sup>15</sup> Second, upstart leagues in football, hockey, and basketball created competition for player services, driving up salaries.<sup>16</sup> Both of these first two developments led players to seek assistance in navigating among competing offers for their services.<sup>17</sup> Third, player unions came into their own, extracting significant concessions from ownership, while

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without-an-agent/ (last visited May 1, 2016).

<sup>10</sup> See KENNETH L. SHROPSHIRE & TIMOTHY DAVIS, *THE BUSINESS OF SPORTS AGENTS* 11 (2d ed. 2008) (this book focuses its discussion on the four major U.S. sports leagues: Major League Baseball, National Basketball Association, National Football League, and National Hockey League).

<sup>11</sup> PAUL C. WEILER ET AL., *SPORTS AND THE LAW: TEXT, CASES, AND PROBLEMS* 693 (5th ed. 2015).

<sup>12</sup> Donald Fehr, *Union Views Concerning Agents: With Commentary on the Present Situation in Major League Baseball*, 4 MARQ. SPORTS L.J. 71, 72 (1993).

<sup>13</sup> *Id.* (noting the clubs’ position towards players: “You are my potential employee, or you are my actual employee, and if you want to talk to me about a new contract or a raise, I will be glad to talk to you, by yourself, on my terms, for as long as I want to, and you cannot bring anyone with you.”).

<sup>14</sup> See SHROPSHIRE, *supra* note 10, at 12–14.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

formally delegating the role of salary negotiator to sports agents.<sup>18</sup> Fourth, television revenues and endorsement deals were booming, placing even more money on the table for players.<sup>19</sup> At this juncture, players needed negotiating and financial planning expertise to exploit opportunity and optimize their wealth. The consensus view, especially for amateur athletes coming out of high school and college, was that agent representation in negotiating the first professional player contract was essential “to protect their [player] interests and match the negotiating skill of a general manager or member of a professional team.”<sup>20</sup>

At the same time, rising player salaries and the commissions to be earned from negotiating those salaries made the career of sports agents more appealing.<sup>21</sup> By the early 2000s, the aggregate number of sports agents registered in the four major sports leagues—MLB, NBA, NFL, and NHL—amounted to almost one agent for every two players on their combined rosters.<sup>22</sup> Individuals from a variety of educational backgrounds—dominated by law, finance, and business—came to populate the sports agent field.<sup>23</sup> While negotiating the player contract

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<sup>18</sup> Id. See also James Malone & Daren Lipinsky, *The Game Behind the Games: Unscrupulous Agents in College Athletics & California's Miller-Ayala Act*, 17 LOY. L.A. ENT. L.J. 413, 433 (1997) (“A part of the problem is that there's just a terrible psychology on the part of many athletes, not all but many athletes, who are used to being given things. All of their lives they have been pampered and promoted on the basis of their tremendous athletic prowess.”).

<sup>19</sup> See SHROPSHIRE, *supra* note 10, at 12–14.

<sup>20</sup> Stacey M. Nahrwold, *Are Professional Athletes Better Served by A Lawyer-Representative Than an Agent? Ask Grant Hill*, 9 SETON HALL J. SPORT L. 431, 437 (1999); see also L.A. Rams Football Club v. Cannon, 185 F. Supp. 717, 719 (S.D. Cal. 1960) (allowing college football player to breach contract with NFL team based in part on his lack of representation); see generally Curtis D. Rypma, *Sports Agents Representing Athletes: The Need for Comprehensive State Legislation*, 24 VAL. U. L. REV. 481, 482 (1990).

<sup>21</sup> Stephens, *supra* note 4 (observing that sports agents are typically paid 3-10% of the player's salary).

<sup>22</sup> See SHROPSHIRE, *supra* note 10, at 18. (counting approximately 1,800 sports agents as of 2006, when the combined rosters of the four major leagues totaled approximately 4,200 players).

<sup>23</sup> The earliest sports agents often lucked into the role. See, e.g., LEIGH STEINBERG, *THE AGENT: MY 40-YEAR CAREER MAKING DEALS AND CHANGING THE GAME* 35-38 (Thomas Donne Books 2014) (law student Steinberg was the resident advisor in NFL quarterback Steve Bartkowski's college dorm); Scott R. Rosner, *Conflicts of Interest and the Shifting Paradigm of Athlete Representation*, 11 UCLA ENT. L. REV. 193, 196 n.9 (2004) (Donald Dell was friends with Arthur Ashe when he needed help negotiating endorsement deals after he won Wimbledon); BOB WOOLF, *BEHIND CLOSED DOORS* 42–46 (New York: Atheneum 1976) (Woolf counseled Boston Red Sox pitcher Earl Wilson about a car accident before negotiating his player contract). See also Andrew Brandt, *So You Want to be an*

*continued . . .*

remained an agent's core service, many agents began to handle endorsement deals as well as a menu of management services relating to tax and estate planning, investing, budgeting, intellectual property protection, real estate, charitable giving, and domestic arrangements.<sup>24</sup> Agents eager to recruit and retain elite athletes also began providing what have been derided as "babysitting" services, which can range from retrieving items left in the team hotel during a road trip to helping conceal adultery from a spouse.<sup>25</sup>

As the sports agent business became increasingly competitive, ethics became the "biggest casualty."<sup>26</sup> Client poaching and illegal recruiting tactics became rampant.<sup>27</sup> Sports agent malfeasance frequently made the headlines and court dockets, with stories of agents defrauding clients, misappropriating client funds, sabotaging college athlete eligibility and prospects, engaging in conflicts of interest, and providing incompetent representation.<sup>28</sup> Commentators even suggested that "because of the fears associated with agents, some athletes are again meeting with management one-on-one in order to get the best possible deal."<sup>29</sup> Thus, despite the agent's purported role

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*NFL Agent*, HUFFINGTON POST SPORTS (Oct. 15, 2010), [http://www.huffingtonpost.com/andrew-brandt/so-you-want-to-be-an-nfl\\_b\\_764188.html](http://www.huffingtonpost.com/andrew-brandt/so-you-want-to-be-an-nfl_b_764188.html) (last visited May 15, 2016) (noting the best way to become an agent is "be college roommates with a first-round draft pick").

<sup>24</sup> See SHROPSHIRE, *supra* note 10, at 31–32.

<sup>25</sup> See also Malone & Lipinsky, *supra* note 18, at 433.

<sup>26</sup> See Ethan Lock, *The Regulatory Scheme for Player Representatives in the National Football League: The Real Power of Jerry Maguire*, 35 AM. BUS. L.J. 319, 320 (1998); see also Mike Freeman, *Pro Football: Protecting Players From Their Agents; Misconduct Leaves NFL Union Fearful of Incompetence and Greed*, N.Y. TIMES (Jul. 26, 1998), <http://www.nytimes.com/1998/07/26/sports/pro-football-protecting-players-their-agents-misconduct-leaves-nfl-union-fearful.html?pagewanted=all> (last visited Jun. 20, 2016).

<sup>27</sup> See Stacey B. Evans, *Sports Agents: Ethical Representatives or Overly Aggressive Adversaries?*, 17 VILL. SPORTS & ENT. L.J. 91, 102–03, 107–08 (2010); Eric Willenbacher, *Regulating Sports Agents: Why Current Federal and State Efforts Do Not Deter the Unscrupulous Athlete-Agent and How a National Licensing System May Cure the Problem*, 78 ST. JOHN'S L. REV. 1225, 1227–28 (2004).

<sup>28</sup> See *Jones v. Childers*, 18 F.3d 899 (11th Cir. 1994); *Hilliard v. Black*, 125 F. Supp. 2d 1071 (N.D. Fla. 2000); *Walters v. Fullwood*, 675 F. Supp. 155 (S.D.N.Y. 1987); *Detroit Lions, Inc. v. Argovitz*, 580 F. Supp. 542 (E.D. Mich. 1984); *People v. Sorkin*, 64 A.D.2d 680, (N.Y. App. Div. 1978); Josh Luch, *Confessions of an Agent*, SPORTS ILLUSTRATED (Oct. 18, 2010), <http://www.si.com/more-sports/2010/10/12/agent> (last visited June 20, 2016);

<sup>29</sup> See Evans, *supra* note 27, at 127; David S. Caudill, *Sports and Entertainment Agents and Agent-Attorneys: Discourses and Conventions Concerning Crossing Jurisdictional and Professional Borders*, 43 AKRON L. REV. 697, 713 (2010) (observing that "[t]he problem we have now is how to protect the player from the agent").



as protector of athletes' interests in relation to team owners, the need arose to protect athletes' interests in relation to agents,<sup>30</sup> resulting in extensive regulation of agents by Congress, state legislatures, and players associations.<sup>31</sup>

Agent regulation was a response to multiple impulses and concerns, most prominently the need to reinforce the fiduciary duties that are central to the principal/agent relationship.<sup>32</sup> As described in the sports agent context, the essence of this role is "undivided loyalty [to the player] and the duty to act in good faith at all times."<sup>33</sup> The Restatement of Agency apportioned a fiduciary's duties into two distinct buckets.<sup>34</sup> The "duty of loyalty" primarily requires an agent to avoid conflicts of interest and self-dealing, preserve confidentiality, and follow the principal's instructions.<sup>35</sup> The agent's "duty of performance" requires care, competence, and diligence, as well as acting only within the scope of actual authority granted by the principal, complying with the law, accounting for all of the principal's funds, and keeping the principal apprised of all matters that may affect his interests.<sup>36</sup> Proliferating public and private regulation of sports agents has attempted to "explicitly spell out these obligations."<sup>37</sup>

The costs imposed by both the regulatory environment and player demand for a "smorgasbord of services" led to consolidation in the agency business as smaller firms and independent agents lacked the resources to lure and keep clients.<sup>38</sup> However, "the synergies sought by consolidation [led] to an increased likelihood of yet another ethical dilemma—conflicts of interest."<sup>39</sup> The big agencies typically represent multiple players in the same league and even multiple

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<sup>30</sup> See Caudill, *supra* note 29, at 713.

<sup>31</sup> See, e.g., Sports Agent Responsibility and Trust Act, 15 U.S.C. §§ 7801-07 (effective 2004) [hereinafter SPARTA]; Uniform Athlete Agent Act (adopted by 42 states as of 2014) [hereinafter UAAA]; NFLPA Regulations, *supra* note 2.

<sup>32</sup> See Richard T. Karcher, *Solving Problems in the Player Representation Business: Unions Should Be the "Exclusive" Representatives of the Players*, 42 WILLAMETTE L. REV. 737, 748 (2006).

<sup>33</sup> See SHROPSHIRE, *supra* note 10, at 20.

<sup>34</sup> RESTATEMENT (THIRD) OF AGENCY §§ 8.01-8.12 (2006).

<sup>35</sup> *Id.* at §§ 8.02-8.06 (2006).

<sup>36</sup> *Id.* at §§ 8.07-8.12 (2006); see ROBERT H. RUXIN, AN ATHLETE'S GUIDE TO AGENTS 13 (5th ed. 2010) (contextualizing the agent's duties in the world of athlete representation).

<sup>37</sup> See SHROPSHIRE, *supra* note 10, at 21; see, e.g., SPARTA, *supra* note 31, at § 7802; UAAA, *supra* note 30, at § 14; N.Y. GEN. BUS. LAW § 899-1 (McKinney 2003); NFLPA Regulations, *supra* note 2, at § 3(B).

<sup>38</sup> See Karcher, *supra* note 32, at 740-41; see Rosner, *supra* note 23, at 197.

<sup>39</sup> See Rosner, *supra* note 23, at 195; see also Karcher, *supra* note 32, at 759.

players on the same team.<sup>40</sup> Some agencies represent team management, alongside players and coaches.<sup>41</sup> Players understandably become disenchanted with their agents when a conflict rears its head. Former San Francisco 49ers quarterback Alex Smith considered changing his agent during the period when he was looking for a new team because his agent also represented another free agent quarterback, rival Peyton Manning.<sup>42</sup>

Ethical shortcomings in the sports agent business have not been alleviated by the presence of lawyers ostensibly bound by rules of professional conduct. To the contrary, a “competitive tension” between non-attorney agents and attorney agents has emerged, with attorneys at a disadvantage insofar as they are restrained by rules barring, for example, solicitation, conflicts of interest, and unauthorized practice of law (UPL) in states where they are not licensed.<sup>43</sup> Implicit in this tension is that non-attorney agents themselves are engaging in UPL, and doing so in an ethically questionable manner.<sup>44</sup> However, few jurisdictions actively enforce their UPL restrictions, and have little incentive to do so against sports agents increasingly subject to parallel—if similarly rarely enforced—ethical regulations.<sup>45</sup> Thus, regulatory failure has allowed non-attorney agents to exploit their “operational” freedom vis-à-vis attorney agents to dominate the business as well as degrade its reputation.<sup>46</sup>

Coinciding with increasing concern about agent ethics has been the increasing complexity of major league collective bargaining

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<sup>40</sup> See Rosner, *supra* note 23, at 210–11.

<sup>41</sup> *Id.* at 214.

<sup>42</sup> Ryan Wilson, *Report: Alex Smith Could Drop Agent Who Also Represents Payton Manning*, CBSSPORTS.COM (Mar. 18, 2012), <http://www.cbssports.com/nfl/eye-on-football/17883556/report-alex-smith-could-drop-agent-who-also-represents-peyton-manning> (last visited May 1, 2016); see also Darren Heitner, *Conflicts of Interest in the Representation of Rookie NFL Players*, SPORTS AGENT BLOG (Nov. 20, 2013), <http://sportsagentblog.com/2013/11/20/conflicts-of-interest-in-the-representation-of-rookie-nfl-players/> (last visited May 1, 2016); Jack Marshall, *The Unforgivable Conflict of Interest: Sports Agents, Robbing their Ignorant Clients*, ETHICS ALARMS (Jan. 16, 2014), <https://ethicsalarms.com/2014/01/16/the-unforgivable-conflict-of-interest-sports-agents-robbing-their-ignorant-clients/> (last visited May 1, 2016) (identifying conflicts in Scott Boras’ representation of MLB pitchers Clayton Kershaw and Masahiro Tanaka).

<sup>43</sup> See Caudill, *supra* note 29, at 701.

<sup>44</sup> See *id.* at 704.

<sup>45</sup> See *id.* at 711–13 (describing how real estate agents have been subject to effective UPL prohibitions that, e.g., specifically identify documents that must be prepared by lawyers).

<sup>46</sup> See SHROPSHIRE, *supra* note 10, at 106.

agreements (CBAs) over the last 20 years. Collectively, major league CBAs have spawned a push-and-pull effect on the utility of sports agents.<sup>47</sup> Their greater complexity recommends enlisting sports agents for their sophisticated and practiced understanding of CBA economics, while tailoring the player contract to the client's particular needs.<sup>48</sup> These same CBAs, however, have dictated a wide range of non-negotiable player benefits and have standardized many aspects of the player-team relationship.<sup>49</sup> All four major professional leagues now require use of a standard player contract in which the only negotiable terms relate to compensation and length.<sup>50</sup> Further, CBAs have introduced elaborate revenue sharing systems involving rookie pay scales and salary caps/taxes that guarantee players a minimum share of aggregate league revenues while giving owners a measure of cost control and predictability.<sup>51</sup> With the bargaining range for player compensation circumscribed by the CBA and standard contract language, the agent's role as contract advisor arguably has narrowed.<sup>52</sup>

Perhaps the most telling evidence of the shrinking role of the sports agent in negotiating the player contract is that the leading textbook in the field, Peter Carfagna's *Representing the Professional Athlete*, barely discusses that setting.<sup>53</sup> The book's negotiation and drafting exercises involve the athlete/agent representation agreement, athlete endorsements, publicity rights licensing, and the legal relationship between the agent and the mega-agency.<sup>54</sup> Discussion of relevant law extends to agent regulation, NCAA amateurism rules,

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<sup>47</sup> See generally Timothy Davis, *Regulating the Athlete-Agent Industry: Intended and Unintended Consequences*, 42 WILLAMETTE L. REV. 781, 782 (2006).

<sup>48</sup> Dan Weil, *NBA Do-It-Yourselfers Rare*, SPORTS BUSINESS JOURNAL (Jan. 31, 2000), <http://www.sportsbusinessdaily.com/Journal/Issues/2000/01/20000131/No-Topic-Name/NBA-Do-It-Yourselfers-Rare.aspx?hl=Los%20Angeles%20Clippers&sc=0>. (last visited May 1, 2016).

<sup>49</sup> See, e.g., NFL Collective Bargaining Agreement 2011-2020, Arts. 7, 8 [hereinafter, NFL CBA] (outlining compensation parameters for rookies and veterans with less than three seasons); MLB Basic Agreement 2012-2016, Art. VI [hereinafter, MLB BA] (outlining salary calculations).

<sup>50</sup> See Shepard Goldfein, James A. Keyte, & Paul M. Eckles, *Player-Team Contractual Relations – Generally*, 11 BUS. & COM. LITIG. FED. CTS. § 125:7 (3d ed. 2016); see also, NFL CBA, *supra* note 49, App. A; MLB BA, *supra* note 50, Sched. A; NBA Collective Bargaining Agreement 2011-12, Ex. A; NHL Collective Bargaining Agreement 2012-2022, Ex. 1 [hereinafter NHL CBA].

<sup>51</sup> See generally Davis, *supra* note 47.

<sup>52</sup> See Rosner, *supra* note 23, at 244 (Some would argue that the complexity of the salary cap era makes professional contract advice even more essential); see also Weil, *supra* note 48.

<sup>53</sup> See generally PETER CARFAGNA, *REPRESENTING THE PROFESSIONAL ATHLETE* (2d ed. 2014).

<sup>54</sup> *Id.* at xi-xvii.

commercial contract drafting principles, intellectual property, tort, and statutory compensation for injury, and employment law.<sup>55</sup> Notably absent is any in-depth treatment of labor law or the major league CBA provisions relevant to negotiating the player contract. Other than describing the numerous instances in which agents have abused the trust of their clients,<sup>56</sup> the textbook mentions the agent's role with respect to the player-team contract only briefly in the context of recommending the athlete's absence from the negotiating table.<sup>57</sup> By no means does this appraisal impugn the merits of Professor Carfagna's work; it very much deserves its reputation as "the most authoritative sports agent book."<sup>58</sup> But its coverage choices reflect that the sports agent business has developed in new directions that deemphasize the function that was its provenance: negotiating the player contract.

### B. The Professional Athlete's Career Path

In the environment described above, professional athletes have begun to question whether agents qua contract advisors deliver enough value in the contract negotiation setting to justify paying the commissions they charge.<sup>59</sup> To put this trending skepticism in perspective, consider the earning history of a journeyman NBA player under the league's current CBA. As an amateur coming out of college, he participates in the NBA draft, which has two rounds. Players drafted in the first round sign a guaranteed two-year contract that is subject to a rookie salary cap with limited room for negotiation.<sup>60</sup> The team that drafts the first round player has rights to him for up to four years, at which time he may become a restricted free agent. Only after five years may he become eligible for unrestricted free agency.<sup>61</sup> By contrast, players drafted in the second round may obtain unrestricted free agency status earlier, but only after playing under a non-guaranteed contract, often for the league minimum.<sup>62</sup> Undrafted players become unrestricted free agents, although rarely do they ever

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<sup>55</sup> *Id.* at 10–15, 31–61, 83–90, 108–12, 120–42, 174–92, 197–207.

<sup>56</sup> *Id.* at 2–10.

<sup>57</sup> *Id.* at 80–81; *infra* note 202.

<sup>58</sup> See Darren Heitner, *Announcing Second Edition of Most Authoritative Sports Agent Book*, SPORTS AGENT BLOG (Oct. 29, 2014), <http://sportsagentblog.com/2013/10/29/announcing-second-edition-of-most-authoritative-sports-agent-book/> (last visited May 15, 2016).

<sup>59</sup> Rothstein, *supra* note 4.

<sup>60</sup> NBA CBA, *supra* note 49, Art. VIII.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

play in the NBA.<sup>63</sup> Thus for the first four years of most players' careers, their earning potential is fairly predictable. Keep in mind that the average NBA career length is 4.8 years.<sup>64</sup>

NBA players who eventually become unrestricted free agents enter a phase of their career in which the market for their services is at its most competitive, with their negotiating leverage deriving mostly from their own demonstrated basketball skills.<sup>65</sup> Thus, marquee players often will "max out" the system, obtaining the longest and most remunerative contract allowed under the CBA and not requiring much negotiation.<sup>66</sup> Even if our journeyman player strikes it rich as an unrestricted free agent, his contract is subject to collectively-bargained parameters under the salary cap.<sup>67</sup> Throughout this process, the player union collects and archives information about every player contract.<sup>68</sup> Furthermore, with the advent of the Internet and proliferation of sports publications, players and the public have almost instantaneous access to reams of data about player compensation and contract structures.<sup>69</sup> As NBA agent Keith Kreiter stated, "Every contract is just a form agreement. My plumber [sic] could negotiate a first-round pick's contract as good as the best negotiator in the country can."<sup>70</sup>

The economic path of players in the other major sports is similarly ascertainable. Thus, players across all sports are having second thoughts about agent commissions that range from three to ten percent of a player's gross, pre-tax compensation.<sup>71</sup> For example, in 2015, the

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<sup>63</sup> See generally Michael A. McCann, *It's Not About the Money: The Role of Preferences, Cognitive Biases, and Heuristics Among Professional Athletes*, 71 BROOK. L. REV. 1459, 1488 (2006).

<sup>64</sup> Cork Gaines, *The Average NBA Player Will Make a lot More in His Career than the Other Major Sports*, BUSINESS INSIDER (Oct. 10, 2013), <http://www.businessinsider.com/chart-the-average-nba-player-will-make-lot-more-in-his-career-than-the-other-major-sports-2013-10> (last visited May 15, 2016).

<sup>65</sup> See Evans, *supra* note 27, at 105–06.

<sup>66</sup> NBA CBA, *supra* note 49, Art. II.

<sup>67</sup> See McCann, *supra* note 63, at 1488–89 n.162.

<sup>68</sup> See NBPA website, <http://nbpa.com/about/> (last visited May 15, 2016) (noting that players can request from the union "salary and pertinent information to assist in individual contract negotiations").

<sup>69</sup> See KARCHER, *supra* note 32, at 765; see also Darren Heitner, *Are We Really Needed?*, SPORTS AGENT BLOG (March 24, 2009), <http://sportsagentblog.com/2009/03/24/are-we-really-needed/> (last visited May 15, 2016) (observing that travel agents, stockbrokers, and other go-between professions have withered in the Internet age).

<sup>70</sup> See SHROPSHIRE, *supra* note 10, at 28.

<sup>71</sup> Billy Stephens, *Do You Really Need an Agent? Part II*, SPORTS MONEY (Aug. 15, 2013), <http://sportsmoney.com/do-you-really-need-an-agent-part-2/> (last visited May 1, 2016) (noting that the NFL caps agent commission at 3% and the NBA at 4%).

average MLB player salary topped \$4,000,000 per year, while the average MLB contract advisor earned five percent commission.<sup>72</sup> Doing the math, the agent would skim \$200,000 off the top of that annual salary, and \$1,000,000 over the course of a five-year deal. With player compensation growing every year, and the agent's utility as a contract adviser shrinking, paying a commission—as opposed to a flat fee or hourly rate—makes less sense to certain players.<sup>73</sup> The “big bucks” that led to widespread use of contract advisors in the last decades of the Twentieth century have gotten so big in the first decades of the Twenty-First century that some players are second-guessing the traditional agent relationship and mode of compensation.<sup>74</sup>

### C. Players Negotiating Their Own Player Contracts

Self-negotiation of player contracts in the modern era actually dates back to the 1980s and Danny Ainge of the Boston Celtics, Alan Trammell of the Detroit Tigers, and Mike Singletary of the Chicago Bears.<sup>75</sup> Interestingly, the motivation for going it alone was not always to maximize take-home pay.<sup>76</sup> Alan Trammell acknowledged that he left money on the table in his 1980 self-negotiation with the Tigers, but wanted to stay loyal to a team that brought him up through the minor leagues and stuck it out through his injuries.<sup>77</sup> When Danny Ainge re-signed with the Celtics in 1986 without representation, he agreed to a six-year, \$4.1 million deal, saving \$160,000 in commissions.<sup>78</sup> But the last three years of that contract paid him significantly below the league average, a fact he rationalizes as a

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<sup>72</sup> Kurt Baudenhausen, *Average MLB Player Salary Nearly Double NFL's, But Still Trails NBA's*, FORBES (Jan. 23, 2015), <http://www.forbes.com/sites/kurtbadenhausen/2015/01/23/average-mlb-salary-nearly-double-nfls-but-trails-nba-players/#775daa0e269e> (last visited May 1, 2016); Stephens, *supra* note 71.

<sup>73</sup> See Stephens, *supra* note 71.

<sup>74</sup> See Rothstein, *supra* note 4, at 38–40; Karcher, *supra* note 32, at 744.

<sup>75</sup> See SHROPSHIRE, *supra* note 10, at 24.

<sup>76</sup> *Id.*

<sup>77</sup> See Mitchell Kramer, *Alan Trammell Negotiated His Own Contract*, PRO SPORTS GROUP, <https://prosportsgroup.com/sports-agent-news/mitch-flashback-alan-trammell-negotiated-his-own-contract/> (last visited May 1, 2016). (But Trammell conceded he might use a contract advisor when he became a free agent later in his career); See UPI Archives, *Shortstop Alan Trammell Is Hinting He May Become A Free Agent* (Jan. 19, 1989), <http://www.upi.com/Archives/1989/01/19/Shortstop-Alan-Trammell-is-hinting-he-may-become-a/5527601189200/> (last visited May 1, 2016).

<sup>78</sup> See Bove, *supra* note 9.

learning experience that led him to post-playing career success as an NBA general manager.<sup>79</sup>

In the late 1990s, coinciding with the rise in player salaries and stricter CBA parameters for those salaries, a handful of players chose to represent themselves in large part to avoid paying an agent's fee on a commission basis.<sup>80</sup> This first wave of athletes to self-negotiate were mostly veteran free agents who had a fairly predictable market value. Tight end Tony McGee negotiated a 1999 contract extension with the Cincinnati Bengals that put him at the top of the yearly average salaries of three comparable players.<sup>81</sup> He observed: "[I]t was a good fit to stay here. I also felt like [team ownership] treated me very fairly. . . . Maybe an agent would have gotten me a couple of thousand more. Maybe not. But I don't have any agent fees to pay."<sup>82</sup>

In general, veteran free agents who were inclined to stay put, and trusted their team, were more confident in self-negotiating.<sup>83</sup> This theme especially reverberated when the free agent was recovering from injuries or winding down his career, including, in 2002 alone, New England Patriots linebacker Tedy Bruschi, St. Louis Cardinals pitcher Matt Morris, and Seattle Mariners pitcher Jamie Moyer.<sup>84</sup> Trust in management and a desire for stability at the tail end of his career motivated running back Ricky Williams to self-negotiate his 2008 contract extension with the Miami Dolphins.<sup>85</sup> Similarly, when

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<sup>79</sup> See *id.* (also noting that Hakeem Olajuwon negotiated his own contract in 1986 with the help of an attorney).

<sup>80</sup> See Karcher, *supra* note 32, at 743–44.

<sup>81</sup> Geoff Hobson, *McGee Negotiates Own Contract Extension*, THE CINCINNATI ENQUIRER (Dec. 15 1999), [http://bengals.enquirer.com/1999/12/15/ben\\_mcgee\\_negotiates\\_own.html](http://bengals.enquirer.com/1999/12/15/ben_mcgee_negotiates_own.html) (last visited May 1, 2016).

<sup>82</sup> *Id.*

<sup>83</sup> See RUXIN, *supra* note 36, at 24 (noting that in 2009 most of the 15 NFL players—out of 1950—who negotiated their own contracts were veterans who had used an agent for a prior negotiation); see also McCann, *supra* note 63, at 1497–99 (noting the phenomenon of “regional affinity” or “hometown bias” whereby athletes forgo more money in favor of remaining in place).

<sup>84</sup> See Rosner, *supra* note 23, at 197 n.12; Jim Salisbury, *Era of the Sports Agent is Here to Stay*, PHILADELPHIA INQUIRER (Dec. 26, 2003), [http://articles.philly.com/2003-12-26/sports/25470506\\_1\\_agents-jeff-borris-seattle-general-manager](http://articles.philly.com/2003-12-26/sports/25470506_1_agents-jeff-borris-seattle-general-manager) (last visited May 1, 2016).

<sup>85</sup> Jason Cole, *Source: Williams Should Have Gotten Better Deal*, YAHOO SPORTS (Sep. 5, 2008), <http://sports.yahoo.com/nfl/news?slug=jc-williamscontract090508> (last visited May 1, 2016). This news report, and many others at the time, crowed about the weak deal Williams negotiated for himself, a familiar refrain in commentary about player self-negotiators. It is not within the scope of this article to assess the efficacy of player self-negotiators or whether an agent would have struck a better deal, but it is worth observing that what constitutes a good deal is highly subjective in this setting. See McCann, *supra* note 63, at 1460

*continued . . .*

safety Bernard Pollard self-negotiated his 2014 contract extension with the Tennessee Titans, it was noted that he was at the end of his career and did not want to leave the team.<sup>86</sup>

Some veterans who have negotiated their own contracts have explained below-market deals as a calculated accommodation of team finances to enable building a winning team. When Gilbert Arenas resigned with the Washington Wizards in 2008 without using an agent, he acknowledged accepting an offer \$16 million less than the maximum he would have been entitled to under the CBA's free agent caps.<sup>87</sup> He explained his decision as reluctance to "financially bind" his team: "I don't wanna [sic] be one of those players and three years down the road your team is strapped and can't do anything about it."<sup>88</sup> In 2013, San Francisco 49er defensive lineman Justin Smith self-negotiated the two-year contract extension that was anticipated to be his last after returning from an injury.<sup>89</sup> Although the new deal cut his overall compensation in half, Smith at the time described it as "pretty simple, straightforward" because it "wasn't about [my agent]" but "about wanting to be here, wanting to play and having an opportunity to be on a great team and go for the championship."<sup>90</sup>

Self-negotiation also made sense to Ray Allen, an elite basketball player who wanted to stay with his team under a CBA that capped compensation for players in his situation. As a free agent in 1999, Allen negotiated the richest deal in Milwaukee Bucks history and the maximum salary permitted by the CBA at the time—\$70 million over six years—saving himself more than \$2.8 million in the traditional four percent agent's commission.<sup>91</sup> Even so, Allen realized he needed

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(observing that "many [athletes] significantly discount financial compensation. Indeed, for a variety of expressed motivations, professional athletes regularly select the non-optimal contract offer, at least in the traditional sense of optimality").

<sup>86</sup> Frank Schwab, *Would Ndamukong Suh Really Negotiate His Own Contract with the Lions?*, YAHOO SPORTS (March 4, 2014), <http://sports.yahoo.com/blogs/nfl-shutdown-corner/would-ndamukong-suh-really-negotiate-his-own-contract-with-the-lions--174504706.html> (last visited May 15, 2016).

<sup>87</sup> See Associated Press, *Reports: Arenas Agrees to Six-Year, \$111M Contract to Help Wizards' Future*, ESPN (July 7, 2008), <http://espn.go.com/nba/news/story?id=3473164> (last visited May 15, 2016).

<sup>88</sup> *Id.*

<sup>89</sup> Cam Inman, *San Francisco 49ers Sign Justin Smith to a Two-Year Extension*, THE MERCURY NEWS (June 19, 2013), [http://www.mercurynews.com/ci\\_23498132/san-francisco-49ers-sign-justin-smith-two-year](http://www.mercurynews.com/ci_23498132/san-francisco-49ers-sign-justin-smith-two-year) (last visited May 1, 2016).

<sup>90</sup> *Id.*; see Player Salary Data on Justin Smith, SPOTRAC <http://www.spotrac.com/nfl/san-francisco-49ers/justin-smith/cash-earnings/> (last visited May 31, 2016).

<sup>91</sup> See Michael James, *Ray: It's No Secret, Agents in Way*, N.Y. DAILY NEWS (Feb. 12, 1999), [http://www.nydailynews.com/archives/sports/ray-no-secret-agents-](http://www.nydailynews.com/archives/sports/ray-no-secret-agents-continued...)  
*continued . . .*



to hire a lawyer for an hourly fee to review the contract, and a business manager and accountant to make sure the deal was structured beneficially.<sup>92</sup> He retained an attorney-agent at an hourly fee to negotiate his next contract—a five-year extension potentially worth \$85 million.<sup>93</sup> While Allen advocated that more NBA players should represent themselves in contract negotiations, he also carved out important exceptions to that rule, including when a player changes teams or is on the verge of being cut.<sup>94</sup>

Yet, free agents moving on to a new team apparently have also felt comfortable representing themselves when they have confidence in their market value. When the Cincinnati Bengals cut Pro Bowl wide receiver Carl Pickens in 2000, he self-negotiated a five-year deal with the Tennessee Titans remarking: “This is my third time going through this situation . . . so I kind of know what I want. I don’t need an agent to tell me ‘yea or nay’ over a contract I can read and understand.”<sup>95</sup> Similarly, in 2003, MLB pitcher Curt Schilling and outfielder Gary Sheffield negotiated their own free-agent deals in which they moved teams.<sup>96</sup> New England Patriots wide receiver Randy Moss fired his long-time agent in 2010, determined to negotiate his next player contract on his own, while retaining a new agent for marketing opportunities.<sup>97</sup> NFL quarterback Daunte Culpepper famously negotiated his own contracts throughout his career, although towards the end, in 2010, retained a lawyer to advise him.<sup>98</sup>

Occasionally, the narrative about an athlete who represents himself in a contract negotiation suggests that the athlete defaulted to that role only because of differences with his agent. Matt Morris negotiated his

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article-1.835148. (last visited May 1, 2016).

<sup>92</sup> See *id.*

<sup>93</sup> See RUXIN, *supra* note 36, at 23.

<sup>94</sup> See Weil, *supra* note 48; see SHROPSHIRE, *supra* note 10, at 25.

<sup>95</sup> Associated Press, *Pickens Negotiates Own Contract with Tennessee* (July 27, 2000), <http://archive.showmenews.com/2000/Jul/20000727Spor013.asp> (last visited May 1, 2016).

<sup>96</sup> See Salisbury, *supra* note 84; see also Rafael Hermoso, *Red Sox Ace Out the Yankees and Get Schilling for 3 years*, N.Y. TIMES (Nov. 29, 2003), <http://www.nytimes.com/2003/11/29/sports/baseball-red-sox-ace-out-the-yankees-and-get-schilling-for-3-years.html>. (last visited May 1, 2016).

<sup>97</sup> Doug Vinci, *On to the Next One (Kind of): Randy Moss*, SPORTS AGENT BLOG (July 16, 2010), <http://sportsagentblog.com/2010/07/16/on-to-the-next-one-kind-of-randy-moss/> (last visited May 15, 2016) (listing athletes who have at one point represented themselves including many already named in this article and Dave Stieb, Mike Greenwell, David Wells, Tom Seaver, Alan Trammell, Steve Largent, and Gene Upshaw).

<sup>98</sup> Darren Heitner, *Even Daunte Culpepper needs help*, SPORTSAGENT BLOG (Feb. 18, 2010), <http://sportsagentblog.com/2010/02/18/even-daunte-culpepper-needs-help/> (last visited May 1, 2016).

own 2002 contract extension with the St. Louis Cardinals after dismissing his agent because of doubts about where the “agent’s company was going.”<sup>99</sup> Alex Rodriguez removed his agent, Scott Boras, from negotiations with the New York Yankees in 2007, commenting that Boras’ bidding war strategy was a “huge debacle.”<sup>100</sup> In 2012, the NFL’s Osi Umenyiora parted ways with his agent just before he self-negotiated a resolution to contract strife with the New York Giants, timing that suggests his agent was a “road block” to the deal.<sup>101</sup>

As alluded to above, trends in athlete self-negotiation often align with CBA salary structures that fix or circumscribe compensation.<sup>102</sup> The NFL’s 2011 CBA introduced a new rookie compensation system that largely predetermined contract value and bonus amounts, thereby eliminating the vast majority of negotiating required.<sup>103</sup> This led many rookies to extract fee concessions from their agents, and a handful of rookies to decide to go it alone.<sup>104</sup> In 2013, rookie safety Matt Elam, a Baltimore Ravens first round draft pick, negotiated his player contract with the advice of his older brother, veteran safety Abram Elam.<sup>105</sup> In 2015, New York Giants offensive tackle Ereck Flowers negotiated his own deal worth \$23 million over four years, saving himself \$432,000

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<sup>99</sup> See SHROPSHIRE, *supra* note 10, at 24.

<sup>100</sup> See Rothstein, *supra* note 4, at 20; Evans, *supra* note 27, at 106–07 (noting that Gary Sheffield similarly criticized Scott Boras as a “bad person” when he fired the agent in 2003).

<sup>101</sup> Mike Garafolo, *Osi Umenyiora, Giants Agree to Restructured Contract*, NJ.COM (June 1, 2012), [http://www.nj.com/giants/index.ssf/2012/06/osi\\_umenyiora\\_giants\\_agree\\_to.html](http://www.nj.com/giants/index.ssf/2012/06/osi_umenyiora_giants_agree_to.html) (last visited May 1, 2016). Conversely, athletes not attuned to their agent’s reputation may even miss opportunities because “certain teams will try to avoid drafting players who are represented by certain agents.” See RUXIN, *supra* note 36, at 26.

<sup>102</sup> See NFL CBA, *supra* note 49.

<sup>103</sup> See NFL CBA, *supra* note 49, Art. 7.

<sup>104</sup> Andrew Brandt, *Easy Math for Rookies*, SPORTS ILLUSTRATED (June 4, 2015), <http://mmqb.si.com/2015/06/04/nfl-rookie-contracts-cba-agents> (last visited May 1, 2016). (Some believe agents still add value in the new NFL system by helping prospects train and prep for the draft, getting and navigating media attention, and negotiating payment technicalities such as offsets, guarantees, bonuses, and timing). See Jason Fitzgerald, *All About Rookie Contracts and the NFL Draft*, OVER THE CAP (Apr. 25, 2016), <http://overthecap.com/rookie-contracts-nfl-draft/> (last visited May 15, 2016).

<sup>105</sup> Aaron Wilson, *Matt Elam Not Hiring Agent, Plans to Negotiate Own Deal Before Camp Starts, Source Says*, THE BALTIMORE SUN (July 9, 2013), <http://www.baltimoresun.com/sports/ravens/ravens-insider/bal-matt-elam-not-hiring-an-agent-plans-to-negotiate-own-deal-source-says-20130709-story.html#ixzz2YZIBZ9P6> (last visited May 1, 2016).

in agent fees.<sup>106</sup> After the 2016 NFL draft, quarterback Jacoby Brissett, a New England Patriots third-round pick, announced he would not hire an agent.<sup>107</sup> Similarly, the NBA's slotted salaries for first-round draft picks, which leave little room for negotiation, spurred 2016 draft prospect Jaylen Brown to forgo an agent, and instead, consult with the National Basketball Players Association (NBPA) on his first contract.<sup>108</sup>

And that brings us to Seattle Seahawks Russell Okung and his declaration that when he became a free agent in 2016 he would "free my agent."<sup>109</sup> In a widely quoted article for *The Players' Tribune*, Okung advocated for elite athletes to "take ownership of your career and your livelihood."<sup>110</sup> He described an epiphany as a rookie in 2010 when he easily negotiated his agent's commission down from the standard three percent to 2.5 percent.<sup>111</sup> He started questioning how one agent could possess all the expertise necessary to advance his career and the careers of twenty other clients: negotiator, contract law expert, financial advisor, business and risk manager, marketing guru.<sup>112</sup> He realized that at his salary level, the value proposition of giving away 2.5 percent of everything he earned did not make sense.<sup>113</sup> He resolved to educate himself about his market value and to

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<sup>106</sup> Jordan Raanan, *Ereck Flowers, Acting as His Own Agent Signs Rookie Contract with Giants*, NJ.COM (June 18, 2015), [http://www.nj.com/giants/index.ssf/2015/06/ereck-flowers\\_acting\\_as\\_his\\_own\\_agent\\_signs\\_rookie.html](http://www.nj.com/giants/index.ssf/2015/06/ereck-flowers_acting_as_his_own_agent_signs_rookie.html) (last visited May 1, 2016).

<sup>107</sup> Kevin Duffy, *New England Patriots Rookie QB Jacoby Brissett Will Negotiate First Contract Without An Agent, Per Report*, MASSLIVE.COM (May 5, 2016), [http://blog.masslive.com/patriots/2016/05/new\\_england\\_patriots\\_rookie\\_qb\\_3.html](http://blog.masslive.com/patriots/2016/05/new_england_patriots_rookie_qb_3.html) (last visited May 15, 2016).

<sup>108</sup> Adrian Wojnarowski & Bobby Marks, *How a Top Prospect is Bucking the System*, THE VERTICAL (May 19, 2016), <http://sports.yahoo.com/news/how-a-top-prospect-is-bucking-the-system-181542611.html> (last visited June 21, 2016) (noting that Brown eschewed an agent's services despite the fact that many agents don't take commissions on first deals for high-level players).

<sup>109</sup> Okung, *supra* note 1.

<sup>110</sup> *Id.*; see also Belzer, *supra* note 4; Powell, *supra* note 9.

<sup>111</sup> Okung, *supra* note 1.

<sup>112</sup> *Id.* NBA superstar LeBron James had a similar epiphany as a second-year player when he fired his agent and founded LeBron, Inc. to make deals on his behalf, including negotiating for equity ownership in companies he endorses. But this financial model may work only for "players who have tremendous marketing capabilities." See Rothstein, *supra* note 4, at 41. Others suggest the personal management firm works best with the economics of individual sports where some premier athletes have established their own agencies to represent their interests, including pro golfer Rory McIlroy and tennis players Roger Federer, Andy Murray, and Rafael Nadal. See Weiler, *supra* note 11, at 733.

<sup>113</sup> Okung, *supra* note 1.

hire a flat-fee lawyer to supply contract expertise.<sup>114</sup> The contract he ultimately signed with the Denver Broncos in 2016 was richer than most, and saved him potentially \$1.8 million in agent fees.<sup>115</sup>

Despite its breadth, the collected history above suggests that the incidence of professional athlete self-negotiation is still largely situational and idiosyncratic.<sup>116</sup> The vast majority of the 4,200 players across the rosters of the four major leagues rely on third-party agents to negotiate their player contracts.<sup>117</sup> Yet, certain attributes of a player's situation can make the decision to self-negotiate more likely and workable. If player compensation numbers are predictable—either because of CBA parameters or market consensus on player value—agents risk being sidelined. Similarly, an agent's presence may be seen as unnecessarily complicating a negotiation between a team and a player who feels loyalty and trust toward the team and wants to stay.<sup>118</sup> If not a paradigm shift, trends in athlete self-negotiation suggest at least a reassessment of the value proposition of paying a sports agent the standard commissions for negotiating player contracts.<sup>119</sup>

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<sup>114</sup> *Id.*

<sup>115</sup> Bob Condotta, *What the National Media Says About Former Seahawk Russell Okung's New Contract*, THE SEATTLE TIMES (Mar. 19, 2016), <http://www.seattletimes.com/sports/seahawks/what-the-national-media-says-about-russell-okungs-contract/> (last visited May 1, 2016) (noting that Okung's contract was widely criticized for lacking any guaranteed money, which puts an NFL player at risk of walking away with nothing if he is injured or does not perform); *see also* Ryan Clady Discusses Russel Okung's Self-Negotiated Contract, SPORTS AGENT BLOG (Aug. 1, 2016), [http://sportsagentblog.com/2016/08/01/ryan-clady-discusses-russell-okungs-self-negotiated-contract/?utm\\_source=feedburner&utm\\_medium=email&utm\\_campaign=Feed%3A+IWantToBeASportsAgent+%28SportsAgentBlog.com+-+Sports+Agent+News%29](http://sportsagentblog.com/2016/08/01/ryan-clady-discusses-russell-okungs-self-negotiated-contract/?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+IWantToBeASportsAgent+%28SportsAgentBlog.com+-+Sports+Agent+News%29) (last visited Aug. 3, 2016) (reporting that Okung's self-negotiated deal undermined the negotiating leverage of other players at his position).

<sup>116</sup> *See generally* RUXIN, *supra* note 36, at 24 (noting that in 2009 only 15 NFL players out of 1,950 negotiated their own contracts).

<sup>117</sup> *See* SHROPSHIRE, *supra* note 10, at 18.

<sup>118</sup> Brandt, *supra* note 104.

<sup>119</sup> *See* Evans, *supra* note 27, at 104; *see also* Zach Seybert, *For Agents, Business Isn't the Same with Rookie Contracts*, SPORTS AGENT BLOG, (May 12, 2016), [http://sportsagentblog.com/2016/05/12/business-isnt-the-same-withrookies/?utm\\_source=feedburner&utm\\_medium=email&utm\\_campaign=Feed%3A+IWantToBeASportsAgent+%28SportsAgentBlog.com+-+Sports+Agent+News%29](http://sportsagentblog.com/2016/05/12/business-isnt-the-same-withrookies/?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+IWantToBeASportsAgent+%28SportsAgentBlog.com+-+Sports+Agent+News%29).

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### III. SUPPORT AND RESOURCES FOR ATHLETE SELF-REPRESENTATION

Professional athletes who represent themselves in contract negotiations nonetheless have recognized that they should not go it entirely alone.<sup>120</sup> Few players have eschewed all professional expertise in consummating career-defining contractual relationships. And a variety of service providers have stepped in to support players in this situation, including traditional law firms, financial advisors, and marketing and media relations firms. These entities have sought to participate in the wealth-creation in professional sports by providing alternatives to commission-based sports agents and emphasizing the athlete's, not the agent's, brand.<sup>121</sup> In addition, player unions have begun to develop a menu of resources and services to support players who negotiate their own contracts.<sup>122</sup> This Part will describe the still-shifting responses by service providers and the unions to trends in player self-representation.

#### A. Alternative Service-Providers to Commission-based Sports Agents

Between going it alone and using a full-service sports agents lie numerous options. One intermediate measure is using family members to help negotiate contracts, a route taken by baseball's George Brett, basketball's Dominique Wilkins, and hockey's Eric Lindros and Alexander Ovechkin.<sup>123</sup> Ovechkin alone saved easily \$7.5 million by not having to pay an agent the average NHL commission of six percent of his 10-year \$124 million deal.<sup>124</sup> Miami tight end Kellen Winslow Jr. used an agent but only after his father, Hall of Fame tight end Kellen Winslow Sr., auditioned multiple agents and negotiated down the commission.<sup>125</sup> Winslow Sr. advised NFL

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<sup>120</sup> See, e.g., *supra* notes 87 and 105, and accompanying text.

<sup>121</sup> See SHROPSHIRE, *supra* note 10, at 34.

<sup>122</sup> See *infra* text accompanying notes 138–143.

<sup>123</sup> See SHROPSHIRE, *supra* note 10, at 24–25 (Brett was represented by his brother, Wilkins by his mother, and Lindros by his father); see also RUXIN, *supra* note 36, at 24; Michael Farber, *Mother Russia: Alex Ovechkin's Mom Made Sure He Got What he Deserved*, SPORTS ILLUSTRATED (Feb. 25, 2008) <http://www.si.com/nhl/2015/05/08/alex-ovechkins-mother-tatyana-guides-his-career-sports-illustrated-feature-michael-farber> (last visited May 1, 2016) (Ovechkin was represented by his mother, a former Soviet Union basketball Olympian).

<sup>124</sup> See Stephens, *supra* note 71.

<sup>125</sup> See Liz Mullen, *Winslow: Show Dad the Money*, Sports Business Journal (Mar. 8, 2004),

<http://m.sportsbusinessdaily.com/Journal/Issues/2004/03/20040308/Labor->

*continued . . .*

draft prospects to take their time finding an agent and avoid paying the maximum commission:

Anyone who is paying 3 percent for contract negotiation I can tell you is being ripped off. . . . [A]gents have sold them a bag of goods of what they can do for them. All an agent can do for you at the combine is to run around and use your name so they can recruit other players.<sup>126</sup>

For athlete self-negotiators who seek professional help, most resort to the hourly-rate lawyer.<sup>127</sup> Ed Garvey, former executive director of the NFLPA, emphatically recommended this stratagem in favor of sports agents who, in his view, overcharge for their services.<sup>128</sup> Joe Paterno, former Penn State head coach, similarly advised football players turning pro to hire an attorney to negotiate “for a fixed price or at an hourly rate with a percentage cap.”<sup>129</sup>

Specialized law practices have cropped up that eschew commissions and offer advice on player contracts for an hourly fee, including one managed for a time by Lon Babby who represented dozens of players in the NBA, WNBA, and MLB.<sup>130</sup> One of Babby’s clients was NBA superstar Grant Hill, who paid the firm only \$100,000 in fees to negotiate his first contract, compared to the

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Agents/Winslow-Show-Dad-The-Money.aspx. (last visited May 15, 2016).

<sup>126</sup> Liz Mullen, *Winslow Sr.’s Advice: Don’t Sign Quickly, Don’t Pay 3% Negotiation Fee*, SPORTS BUSINESS JOURNAL (Jan. 19, 2004), <http://www.sportsbusinessdaily.com/Journal/Issues/2004/01/20040119/Labor-Agents/Winslow-Srs-Advice-Dont-Sign-Quickly-Dont-Pay-3-Negotiation-Fee.aspx?printandclose=true>. (last visited May 15, 2016).

<sup>127</sup> See SHROPSHIRE, *supra* note 10, at 24 (noting that Tedy Bruschi consulted with an attorney).

<sup>128</sup> See SHROPSHIRE, *supra* note 10, at 25 (noting that Minnesota Twins pitcher Brad Radke used an attorney to negotiate his contract).

<sup>129</sup> Joe Paterno, “*Put It into Perspective*” in FOOTBALL: RISING TO THE CHALLENGE, THE TRANSITION FROM COLLEGE TO PRO 4 (Geoffrey Scot, ed., 2006).

<sup>130</sup> See SHROPSHIRE, *supra* note 10, at 25–26 (describing Lon Babby’s practice at Williams & Connolly and clients including NBA players Grant Hill, Tim Duncan, and Shane Battier; WNBA players Chamique Holdsclaw and Tamika Catchings; MLB players Melvin Mora, Chris Nelson, and Rickie Weeks). Part of the practice has since spun off into Tandem Sports & Entertainment. See Scott Soshnick, *Jeremy Lin Agent Tanner Leaves Law Firm to Start Sports Practice*, BLOOMBERG (Oct. 13, 2013), <http://www.bloomberg.com/news/articles/2013-10-14/jeremy-lin-agent-tanner-leaves-law-firm-to-start-sports-practice> (last visited May 15, 2016) (clients include NBA’s Jeremy Lin, Damien Wilkins, and Wesley Saunders, and MLB’s Matt Bowman and Matt McBride).

standard four percent agent's commission, which would have cost him \$1.8 million.<sup>131</sup> Given escalating player salaries, using hourly-rate attorneys potentially offers huge savings.<sup>132</sup> Even while paying attorney Johnnie Cochran \$500 per hour, Ray Allen's legal fees were a fraction of the \$2.8 million in agent commissions his \$70.9 million salary would have garnered.<sup>133</sup>

Granted, players who prefer hourly-rate attorneys over a full-service sports agent may be limited to those sufficiently self-reliant to step out from under the modern agent's umbrella, which can cover everything from paying monthly bills to driving the moving truck to finding hotel rooms for visiting family.<sup>134</sup> NBA player Pat Garrity rebuffed traditional sports agents' "babysitting" in favor of an hourly-rate attorney because "I didn't want someone always checking up on me. . . . I'm a mature person and can take care of a lot of things myself."<sup>135</sup>

Professional help from an accountant or economist may also be sufficient for an athlete to optimize his playing compensation, in the opinion of Len Elmore, former basketball star and agent.<sup>136</sup> Similarly, Alex Rodriguez famously called in friends at investment bank

<sup>131</sup> See Nahrwold, *supra* note 20, at 454. Indeed, attorneys are subject to ethical limits on charging excessive fees, which may limit their use of commission-based billing "given the escalating salaries of professional athletes." Jeremy J. Geisel, *Disbarring Jerry Maguire: How Broadly Defining "Unauthorized Practice of Law" Could Take the "Lawyer" Out of "Lawyer-Agent" Despite the Current State of Athlete Agent Legislation*, 18 MARQ. SPORTS L. REV. 225, 235 (2007).

<sup>132</sup> Kevin Jones, *A World Without Agents*, AV8 SPORTS RESEARCH CENTER (July 2015), <http://www.av8sports.com/blog/author/kjonesnfl/> (last visited May 15, 2016) (estimating that if every player used an agent charging between one and 3 percent for the 2016 season, NFL players will pay agents somewhere between \$49.9 and \$149.8 million of the league-wide revenues shared with players under the salary cap).

<sup>133</sup> See James, *supra* note 91; see also SHROPSHIRE, *supra* note 10, at 26–27 (listing the potential advantages to attorney representation including that they are held to ethical standards including avoidance of conflicts of interest).

<sup>134</sup> See SHROPSHIRE, *supra* note 10, at 28–31.

<sup>135</sup> See *id.* at 31–32; see also Karcher, *supra* note 32, at 740 (observing that sports agencies hire personnel to take care of athlete's needs for a "psychologist, babysitter, social planner, and counselor"); but see James G. Sammataro, *Business and Brotherhood, Can They Coincide? A Search into Why Black Athletes Do Not Hire Black Agents*, 42 HOW. L.J. 535, 540 (1999) (describing how many athletes want and expect their agents "to send [our interns] over to wash his car, or to take his clothes to the dry cleaners").

<sup>136</sup> See SHROPSHIRE, *supra* note 10, at 27–28 ("The day has come when superstars can meet face-to-face with an activist owner and without an agent reach the basics of an agreement. . . . With professional help from a lawyer, accountant or even an economist, a superstar might agree with an owner to only 80 or 90 percent of what an agent could have gotten him, and wind up in no worse position than if an agent did the deal.").

Goldman Sachs to mediate his 2007 near-split with the Yankees, resulting in a 10-year contract potentially worth \$275 million.<sup>137</sup> College athletes contemplating a professional career often will retain a financial advisor rather than an agent, to avoid violating NCAA amateurism rules.<sup>138</sup>

Another alternative is for an athlete to retain “the appropriate mix of professionals [including] an attorney to negotiate the player contract, an accountant to handle finances, an investment firm to handle investments, and one of the sports marketing firms to handle endorsements.”<sup>139</sup> With this competition in mind, larger sports agencies offer alternative billing arrangements, including flat fees, hourly rates, and capped hourly rates.<sup>140</sup> Niche “image-consulting” firms have also cropped up, offering specialized “brand development” services to athletes, including product endorsements, website design, media relations, and reputation and crisis management.<sup>141</sup> Increasingly, athletes who are self-reliant enough to take responsibility and monitor the moving parts can access a full range of services, including support in contract negotiations, from a slate of professionals who in the aggregate will cost substantially less than the commission-based agent.<sup>142</sup>

### **B. Players Association Contract-Negotiation Services**

Meanwhile, the four major players associations have intensified their efforts to support athletes who choose to represent themselves in contract negotiations.<sup>143</sup> Describing those efforts first requires some explanation of the unique characteristics of sports player unions. Under the National Labor Relations Act, unions are certified as the “exclusive representative of all the employees in the unit for purposes of collective bargaining.”<sup>144</sup> This means that once a union is certified,

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<sup>137</sup> See Rothstein, *supra* note 4, at 20.

<sup>138</sup> See Karcher, *supra* note 32, at 747.

<sup>139</sup> See SHROPSHIRE, *supra* note 10, at 34.

<sup>140</sup> LISA PIKE MASTERALEXIS ET AL., *PRINCIPLES AND PRACTICE OF SPORT MANAGEMENT* 280-81 (5th ed. 2015).

<sup>141</sup> See, e.g., KMM SPORTS, <http://kmmsports.com/of-the-field/> (last visited May 15, 2016) (representing NFL’s Corey Nelson, Demontre Hurst, and others); ATHLETE BRAND MANAGEMENT, <http://athletebrandmanagement.com/> (last visited May 15, 2016) (representing NBA player Carmelo Anthony).

<sup>142</sup> See SHROPSHIRE, *supra* note 10, at 27–28 (“With professional help from a lawyer, accountant or even an economist, a superstar might agree with an owner to only 80 or 90 percent of what an agent could have gotten him, and wind up in no worse position than if an agent did the deal.”).

<sup>143</sup> See Lock, *supra* note 26, at 321.

<sup>144</sup> National Labor Relations Act, 29 U.S.C.A. § 159(a).



it alone has authority to negotiate the terms and conditions of employment for all members of the bargaining unit. The employer may not bargain with anyone but the union—not with individual employees and not with non-union agents of those employees.<sup>145</sup>

In sports, however, because of the variability of player talent and market value, the players associations have waived their exclusive right to negotiate salaries for individual players, beyond collectively-bargained minimum salaries, benefits, and job protections.<sup>146</sup> Furthermore, to support players in individual contract negotiations, unions in the four major leagues have bargained for systems that include standardized player contracts and a framework for contract negotiations including revenue-sharing mechanisms that guarantee the players collectively receive a minimum share of league revenues.<sup>147</sup> As noted above, the more rigid this framework, the more straightforward the individual salary negotiation.<sup>148</sup>

In addition, players associations have bargained for the right of their members to use a non-union representative—that is, a sports agent—in the contract negotiation process with leagues and teams.<sup>149</sup> These representatives, however, must submit to a union certification process that can include meeting minimal education requirements, attending seminars, and passing a written examination.<sup>150</sup> Once certified, most players associations require agents to remit an annual fee and adhere to a standard code of conduct that caps commissions charged to players, as well as polices unethical behavior and conflicts of interest.<sup>151</sup> Critical to the unions' authority to enforce these

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<sup>145</sup> See 29 U.S.C. § 158(d) (2012) (“to bargain collectively is the performance of the mutual obligation of the employers and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment ....”); 29 U.S.C. § 158(a)(5) (2012) (holding it an unfair labor practice for an employer “to refuse to bargain collectively with the representatives of his employees”); 29 U.S.C. § 159(a) (2012) (stating that the representative selected by the majority of all the employees in such unit is “the exclusive [representative] of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment”).

<sup>146</sup> See WEILER, *supra* note 11, at 108; see Lock, *supra* note 26, at 321.

<sup>147</sup> Lock, *supra* note 26, at 322; see *supra* text accompanying notes 496–52.

<sup>148</sup> See *supra* note 100 and accompanying text; see also WEILER, *supra* note 11, at 697.

<sup>149</sup> See Davis, *supra* note 47, at 817.

<sup>150</sup> See SHROPSHIRE, *supra* note 10, at 136–37; Darren A. Heitner & Bryan Saul, *Jay Z Has 99 Problems, and Being a Sports Agent May Be One*, 24 MARQ. SPORTS L. REV. 59, 67–69 (2013). Courts have upheld the players associations' authority to regulate agents. See *Collins v. Nat'l Basketball Players Ass'n*, 850 F. Supp. 1468 (D. Colo. 1991), *aff'd*, 976 F.2d 740 (10th Cir. 1992).

<sup>151</sup> Heitner & Saul, *supra* note 150, at 68; See generally NFLPA Regulations,

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standards is their right under labor laws to ban non-certified agents from representing players on contract matters and prohibit teams from negotiating with non-certified agents.<sup>152</sup>

Beyond certifying and regulating agents, players associations have historically taken a neutral stance on whether their members should, on principle, rely on sports agents as contract advisors.<sup>153</sup> Their central message to the players has been that the union, more than sports agents, deserves credit for bringing riches to the players.<sup>154</sup> To the extent a negative message about the utility or value of agents can be read into union efforts to regulate the field, that message is countermanded by most players associations' unwillingness to expend resources actually policing and adjudicating agent misconduct.<sup>155</sup> The NFLPA is an outlier and recognized leader in this regard. It is willing to regularly revisit and amend its agent regulations to respond to problems, investigate and sanction agent misconduct, and provide public reports about those investigations.<sup>156</sup>

The NFLPA has also been proven a leader in serving its members who self-negotiate, dating back to former executive director Gene Upshaw, who negotiated his own contracts with the Oakland Raiders as a player in the 1960s and 1970s.<sup>157</sup> Upshaw made it a point during his NFLPA tenure "to provide the tools for players to do [negotiate

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*supra* note 2; NBPA Regulations Governing Player Agents (as amended Feb. 2016); MLB Regulations Governing Player Agents (as amended effective Feb. 15, 2016).

<sup>152</sup> See WEILER, *supra* note 11, at 741; *see, e.g.*, NFLPA Regulations, *supra* note 2, Introduction.

<sup>153</sup> But *see* SHROPSHIRE, *supra* note 10, at 25 (noting that former NFLPA executive director Ed Garvey advised against using an agent).

<sup>154</sup> See Brandt, *supra* note 23.

<sup>155</sup> See Davis, *supra* note 47, at 823 (suggesting that lack of enforcement is partially attributable to reluctance of agents and players to testify against agents); *see* Lock, *supra* note 26, at 347; *see also* CARFAGNA, *supra* note 53, at 15 (noting that several particularly flagrant cases of agent misconduct have even led the injured athletes to sue their unions for negligence, without success).

<sup>156</sup> See Davis, *supra* note 47, at 824; *see also* Shropshire, *supra* note 10, at 137–40.

<sup>157</sup> See Bove, *supra* note 9. NFLPA contract assistance is equally available to agents to ensure the player is getting fair market value. Other union measures to protect its members in player contract negotiations include: (1) a 2014 policy statement that agents must arrange for players to consult with PA attorneys before hiring outside counsel to represent them in appeal hearings or grievances that the PA would handle for free; and (2) a 2016 regulation that actually requires agents to consult with the union before finalizing certain veteran contracts. *See* NFLPA Memorandum to Contract Advisors "Official Stated Policies of the NFLPA" at 3 (June 9, 2014); Mike Florio, *New NFLPA Regulation Mandates Consultation During Negotiations*, NBC SPORTS (Feb. 23, 2016), <http://profootballtalk.nbcsports.com/2016/02/23/new-nflpa-regulation-mandates-consultation-during-negotiations/> (last visited May 15, 2016).

their own contracts],” including free advice, contract review, and statistical comparisons.<sup>158</sup> That tradition has carried through to Russell Okung’s announcement of his intention to negotiate his own contract upon becoming a free agent.<sup>159</sup> Within a week, the NFLPA supplied Okung with the top ten offensive tackle contracts and offered further analysis and legal advice on contract language.<sup>160</sup> Soon after, the NFLPA convened a committee “to re-examine agent fees, educate incoming rookies on options and look into creating an in-house resource to negotiate contracts and/or advise players on doing their own deals.”<sup>161</sup> While the NFLPA committee decided not to lower the three percent maximum agent fee, it announced a new default fee of 1.5 percent and launched a campaign to educate players on their freedom to negotiate alternative arrangements with agents, including reduced and hourly fees.<sup>162</sup> In this regard, the “Compensation for Services” provision of the NFLPA’s Standard Representation Agreement for agents has long listed a range of possible commissions in half-percent increments, from one percent to three percent.<sup>163</sup>

Other players associations also actively support self-negotiators, building on services already offered to all players and their agents. The National Hockey League Players Association (NHLPA) has an archive of all player contracts and freely provides contract data to players and their agents to assist in negotiations and salary arbitrations.<sup>164</sup> The NBPA boasts that it “help[s] players all the time, particularly when a player is without representation.”<sup>165</sup> The union’s website specifically notes that players can call on the union to “receive

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<sup>158</sup> See RUXIN, *supra* note 36, at 24.

<sup>159</sup> See Pelissero, *supra* note 7.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> See Simon Chester, *NFLPA decides not to reduce agent fees at annual meeting*, DRAFTWIRE <http://draftwire.usatoday.com/2016/03/20/nflpa-decides-not-to-reduce-agent-fees-at-annual-meeting/> (last visited May 15, 2016). The NFLPA has been forward-thinking on other fronts, including launching its own media company to generate original content featuring its members as well as athletes from other sports. See Michelle Castillo, *NFLPA’s new media company gives access to athletes*, CNBC (Sep. 21, 2015), <http://www.cnbc.com/2015/09/21/nflpas-new-media-company-gives-access-to-athletes.html> (last visited May 15, 2016); Tyler Endebrock, *NFLPA Lowers Default Agent Fee to 1.5 Percent*, SPORTS AGENT BLOG [http://sportsagentblog.com/2016/08/10/nflpa-lowers-default-agent-fee-to-1-5-percent/?utm\\_source=feedburner&utm\\_medium=email&utm\\_campaign=Feed%3A+IWantToBeASportsAgent+%28SportsAgentBlog.com+-+Sports+Agent+News%29](http://sportsagentblog.com/2016/08/10/nflpa-lowers-default-agent-fee-to-1-5-percent/?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+IWantToBeASportsAgent+%28SportsAgentBlog.com+-+Sports+Agent+News%29) (last visited Aug. 11, 2016).

<sup>163</sup> NFLPA Regulations, *supra* note 2, Appendix D.

<sup>164</sup> See Stephen J. Bartlett, *Contract Negotiations and Salary Arbitration in the NHL... an Agent’s View*, 4 MARQ. SPORTS L.J. 1, 2 (1993).

<sup>165</sup> See RUXIN, *supra* note 36, at 25.

salary and pertinent information to assist in individual contract negotiations.”<sup>166</sup> As mentioned above, a top 2016 draft prospect took the union up on that offer, announcing he would forgo an agent for his rookie contract in favor of using the union.<sup>167</sup> NBA veteran, Stephon Marbury used the players association to negotiate his contracts toward the end of his career, commenting “[t]he best thing about the NBPA is that they work for you for free” and offer “strength in numbers,” having negotiated the CBA for all the players.<sup>168</sup>

Nevertheless, the question remains: what more can and should the player unions do to support players in contract negotiations? Some commentators suggest that unions take back contract negotiations with clubs on behalf of their members.<sup>169</sup> Rather than pay agents three to ten percent, players could pay slightly increased dues to their union to fund increased staffing and resources to support and/or represent players in contract negotiations.<sup>170</sup>

Richard Karcher from *Sports-Law Blog* proposed a more radical approach that he calls the “internal player management agency.”<sup>171</sup> Under this system, player unions would “preserve the unique bifurcation framework of collective and individual negotiations on behalf of the players,” but “offer[] players the option of retaining a union-hired agent to represent them in contract negotiations with the clubs.”<sup>172</sup> Karcher notes the potential advantages of salaried union employees negotiating player contracts beyond the obvious savings in agent fees, including: improved monitoring of agent competence; ensuring all players earn fair market value and are not adversely affected by one player’s poor representation; coordinating representation of each player across all settings, including grievances and disciplinary matters already handled by the union; vitiating the unethical practices that often accompany the fierce competition among agents to secure and retain clients; and reducing conflicts of interest that arise when an agent represents multiple players.<sup>173</sup> As conceived by Karcher, this system would not replace third-party agents, but

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<sup>166</sup> NBPA, <http://nbpa.com/about/> (last visited May 15, 2016).

<sup>167</sup> See Wojnarowski & Marks, *supra* note 108.

<sup>168</sup> See Michael McCann, *Stephon Marbury uses Players’ Association to represent him as a Free Agent*, SPORTS LAW BLOG (July 4, 2009), <http://sports-law.blogspot.com/2009/07/stephon-marbury-uses-players.html> (last visited June 21, 2016).

<sup>169</sup> See Jones, *supra* note 132.

<sup>170</sup> *Id.*

<sup>171</sup> See Karcher, *supra* note 32, at 775.

<sup>172</sup> *Id.* at 774–75.

<sup>173</sup> *Id.* at 775–78.

simply offer players another option.<sup>174</sup>

Taking contract negotiations in-house, however, might raise as many issues as it would resolve. First, player unions' long-term goals may well be in conflict with an individual player's short-term needs, especially given the brief career spans of so many professional athletes.<sup>175</sup> Second, a union-hired contract representative would not be available to athletes at the moment they need counsel most—when they are making the decision whether to turn pro and preparing for the draft.<sup>176</sup> Third, some might consider it a drawback that union representatives would not protect and “babysit” athletes the way sports agents do,<sup>177</sup> although Karcher sees that as a feature that would encourage more players to take personal responsibility for their lives and careers.<sup>178</sup> Meanwhile, no player union has taken any steps to develop an internal player management agency, perhaps because the trends mapped in this article have not reached the critical threshold to support that structure.

#### IV. ETHICAL CONCERNS FOR THE LAWYERS DEALING WITH A SELF-REPRESENTED ATHLETE

While the player side of the bargaining table wrestles with how best to support the self-negotiator, pro sports' team counsel need to appreciate the ethical challenges posed by negotiating directly with a player. When a lawyer deals directly with a non-lawyer in a transactional matter, the lawyer risks traversing three ethical minefields: (A) assisting the non-lawyer's unauthorized practice of law; (B) providing legal advice to an adverse unrepresented person; and (C) communicating directly with a person receiving limited-scope legal services on a subject within the scope of those services.<sup>179</sup> These

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<sup>174</sup> *Id.*

<sup>175</sup> See Alejandro Bodipo-Memba, *Life after the NFL: Typically a Struggle*, USA TODAY (Jan. 28, 2006), [http://www.usatoday.com/sports/football/super/2006-01-28-retirement-perils\\_x.htm](http://www.usatoday.com/sports/football/super/2006-01-28-retirement-perils_x.htm).

<sup>176</sup> See Glenn M. Wong et. al., *Going Pro in Sports: Providing Guidance to Student-Athletes in A Complicated Legal & Regulatory Environment*, 28 CARDOZO ARTS & ENT. L.J. 553, 571 (2011).

<sup>177</sup> See Carfagna, *supra* note 53, at v–vi (noting that most young athletes “lack experience and training in anything outside their respective sports” and therefore need someone “to guide them through what is usually newfound wealth, fame, and opportunity”).

<sup>178</sup> See Richard Karcher, *Players Unions Need to Fix the Agent Business*, SPORTS L. BLOG (Feb. 2, 2006), [http://sports-law.blogspot.com/2006/02/players-unions-need-to-fix-agent\\_02.html](http://sports-law.blogspot.com/2006/02/players-unions-need-to-fix-agent_02.html); See also Rothstein, *supra* note 4, at 43.

<sup>179</sup> MODEL RULES OF PROF'L CONDUCT r. 4.2-4 (AM. BAR ASS'N 1983) (hereinafter MODEL RULES); see, e.g., N.Y. RULES OF PROF'L CONDUCT r. 4.2, 4.3 (2012).

challenges loom for team attorneys specifically, but not the non-attorney members of the team's front office, and thus may be avoided if teams do not use counsel to negotiate player contracts.<sup>180</sup> However, many teams do use lawyers—in-house and outside counsel—to negotiate player contracts.<sup>181</sup> Thus, this part addresses each of the three ethical minefields in turn.

### A. Assisting in the Unauthorized Practice of Law

The first minefield poses the risk that team attorneys are assisting in the unauthorized practice of law (UPL) when they negotiate directly with non-lawyers, whether players, their family members and friends, or non-attorney sports agents.<sup>182</sup> This concern is the easiest to resolve as UPL rules do not apply to a party proceeding pro se (like the self-negotiating player).<sup>183</sup> In addition, team counsel have negotiated with non-attorney player representatives for decades without being cited for facilitating UPL, although it has been suggested that non-attorney sports agents themselves are violating UPL prohibitions.<sup>184</sup>

Rather, the rules against facilitating UPL are intended to address situations when a lawyer has a business relationship with a non-lawyer and takes some affirmative action that enables the non-lawyer to practice law.<sup>185</sup> A New York bar ethics opinion directly addresses the

<sup>180</sup> See *infra* text accompanying notes 228–233.

<sup>181</sup> See Erik Spanberg, *Teams Find Safety in Numbers When It Comes to Their Legal Staff*, SPORTS BUS. J. (May 11, 2015), <http://www.sportsbusinessdaily.com/Journal/Issues/2015/05/11/In-Depth/Team-counsel.aspx>.

<sup>182</sup> MODEL RULES, r. 5.5(a) (“A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.”). This discussion assumes that the player is not himself an attorney.; *But see* Joe Frontieria & Dan Leidl., *WVU's Oliver Luck: from West Virginia and Back Again*, WASH. POST (June 1, 2011) (noting that former NFL quarterback Luck attained a law degree while playing for the Houston Oilers).

<sup>183</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 4 cmt. d (2001).

<sup>184</sup> See Caudill, *supra* note 29, at 701–04; see Geisel, *supra* note 131, at 241; Megan Fuller, *Where's the Penalty Flag? The Unauthorized Practice of Law, the NCAA, and Athletic Compliance Directors*, 54 N.Y. L. SCH. L. REV. 495, 496 (2010) (arguing that college athletic compliance directors are violating state UPL statutes).

<sup>185</sup> See, e.g., MODEL RULES OF PROF'L CONDUCT r. 5.5 (AM. BAR. ASS'N, 8th ed. 2015) [hereinafter “Annotated Model Rules”] (listing cases); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 4 cmt. f (2001); *Compare* N.Y. STATE BAR ASS'N COMM. ON PROF'L ETHICS, Formal Op. 809 (2007) (no UPL assistance being provided when lawyer represents a client in a transaction in which the counterparty has chosen to be represented by a non-lawyer), *with* ARIZ. STATE BAR ASS'N COMM. ON RULES OF PROF'L CONDUCT, Formal Op. 99–107 (finding a UPL violation when

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situation in which a lawyer representing a client in a transactional matter faces off against a non-lawyer.<sup>186</sup> Even if the lawyer suspects that the non-lawyer is engaged in UPL, the lawyer is under no duty to inquire further.<sup>187</sup> As long as the lawyer has not enabled the non-lawyer to undertake this role, she does not assist UPL by merely continuing with a transaction intended to serve the lawyer's client.<sup>188</sup> This interpretation of UPL rules should equally apply to insulate team counsel from ethical risk when dealing with non-attorney player representatives.<sup>189</sup>

### B. Dealing with an Unrepresented Person

Potentially more fraught is the second ethical minefield when dealing directly with a self-negotiating player: impermissibly providing legal advice to an adverse unrepresented person. Under Model Rule 4.3, a lawyer dealing with an unrepresented person must take care not to: (1) "state or imply that the lawyer is disinterested," (2) lead the unrepresented person to "misunderstand[] the lawyer's role in the matter," or (3) "give legal advice to the unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client."<sup>190</sup> The rationale behind this rule is that a lawyer may be in a superior negotiating position when dealing with an unrepresented person, who is entitled to legal protections against overreaching by the lawyer.<sup>191</sup>

Most commentary on Rule 4.3 focuses on the litigation context, but it is equally applicable in the transactional setting.<sup>192</sup> While a

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a lawyer negotiates with an opposing party's non-lawyer public adjuster).

<sup>186</sup> N.Y. STATE BAR ASS'N COMM. ON PROF'L ETHICS, *supra* note 185.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> Contrast a 1999 Arizona formal ethics opinion that defined UPL to include negotiating a contract, and then barred lawyers from setting claims with non-attorney insurance adjusters; ARIZ. STATE BAR ASS'N COMM. ON RULES OF PROF'L CONDUCT, *supra* note 186. (The New York bar committee specifically noted its disagreement with the Arizona opinion as perversely empowering a non-represented counterparty to deny the right to counsel to a represented party.).

<sup>190</sup> Annotated Model Rules, *supra* note 185, r. 4.3.

<sup>191</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 103 cmt. b (2001).

<sup>192</sup> Annotated Model Rules, *supra* note 185, r. 4.3 cmt. 2; *see, e.g.*, N.Y.C. BAR ASS'N, COMM. ON PROF'L AND JUD. ETHICS, Formal Op. 2009-2, at 4 (2009) (acknowledging application of New York version of rule in transactional setting); Russell Engler, *Out of Sight and Out of Line: The Need for Regulation of Lawyers'*

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lawyer may negotiate the terms of a transaction with an unrepresented counterparty, the lawyer must explain that she represents only her client and is not representing the counterparty.<sup>193</sup> The greatest ethical risk faced by a lawyer in this situation may well be the impermissible rendering of legal advice to the unrepresented counterparty.<sup>194</sup> Russell Engler has identified four behavioral “clues” from case law for lawyers confronting this risk:

First, drafting legal documents and presenting them for signature, without more, does not amount to advice. Second, a statement of the action the lawyer's client proposes to take does not amount to impermissible “advice.” Third, a statement advising an unrepresented person to obtain independent counsel is not only permissible, but may become mandatory once communication is inevitable. Fourth, statements necessary to clarify that the lawyer is not disinterested, or to correct a misunderstanding as to whether the lawyer is disinterested, are permissible and may also be mandatory.<sup>195</sup>

Two separate New York bar ethics committees have elaborated on what kind of statements a lawyer may make to a self-represented person in the context of a negotiation.<sup>196</sup> They agree that a lawyer may describe her client's own legal position, as long as her status as interested counsel is obvious.<sup>197</sup> She may go further to provide “certain indisputable information to the unrepresented person, such as the filing requirements” relevant to the legal setting in which the

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*Negotiations with Unrepresented Poor Persons*, 85 CAL. L. REV. 79, 81 (1997) (noting that little attention has been given to the ethics of negotiating with an unrepresented person).

<sup>193</sup> Annotated Model Rules, *supra* note 185, r. 4.3 cmt. 2. (This obligation applies equally to in-house lawyers who wear both “business” and “legal” hats.) Lisa A. Dolak, *Negotiation Ethics: Not an Oxymoron*, INTELL. PROP. L. NEWSL., r.16.7.8, at 17 (Fall 2003).

<sup>194</sup> See Annotated Model Rules, *supra* note 185 (listing cases); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 103 cmt. d (2001); *see also* Engler, *supra* note 192, at 82 (noting the frequency of negotiations between lawyers and lay people and the corresponding frequency of impermissible advice-giving).

<sup>195</sup> *Id.* at 94 (footnotes omitted); *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 103 Reporter's Note (2001) (observing that state law can vary on all of these situations).

<sup>196</sup> N.Y. BAR ASS'N, COMM. ON PROF'L AND JUD. ETHICS, *supra* note 185; N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 768 (2003).

<sup>197</sup> *Id.*



negotiation is taking place.<sup>198</sup> Throughout the interaction, however, the lawyer has a continuing duty to avoid misleading the self-represented person and even to take affirmative steps to clarify her role as adverse to that person.<sup>199</sup> Avoiding giving legal advice gets more complicated when the lawyer prepares a document for signature by the unrepresented person, as team counsel might do with respect to a standard player contract.<sup>200</sup> In the transactional setting, a lawyer may prepare a document that accommodates the needs of the lawyer's client and present it to the unrepresented person, as long as the lawyer does not undertake to advise the unrepresented person concerning the meaning or significance of the document.<sup>201</sup>

With these "clues" in mind, team counsel must carefully walk the lines drawn by Rule 4.3 when dealing directly with a player, as opposed to a non-attorney agent or lawyer. Even those players with the maturity and self-confidence to represent themselves are often relatively young and legally unsophisticated.<sup>202</sup> Thus, team counsel should explicitly identify their role in negotiations, explaining to the player that they represent the team and will be protecting the team's interests.<sup>203</sup> They should refrain both from opining about the law (including the private law embodied in the CBA) and from recommending to players a particular course of conduct.<sup>204</sup> Further, they should avoid making editorial comments about contracts and

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<sup>198</sup> *Id.*

<sup>199</sup> N.Y.C. BAR ASS'N, COMM. ON PROF'L AND JUD. ETHICS, *supra* note 192.

<sup>200</sup> *Id.*

<sup>201</sup> See N.C. STATE BAR, 2015 Formal Ethics Op. 2 (2015) (permitting lawyer to prepare waiver of right to notice of foreclosure for unrepresented borrower); PHILADELPHIA BAR ASS'N PROF'L GUIDANCE COMM., Op. 2011-4 (2011) (estate settlement agreement); S.C. BAR ETHICS ADVISORY COMM., Ethics Advisory Op. 00-17 (2000) (real estate closing documents). This issue frequently arises in the context of the prenuptial agreement, whose validity can depend on whether one party lacks independent counsel, and whether that party was given an opportunity to seek counsel and knowingly refused it. See, e.g., *In re Marriage of Bonds*, 5 P.3d 815, 828 (2000); see also Nancy R. Schembri, *Prenuptial Agreements and the Significance of Independent Counsel*, 17 ST. JOHN'S J. LEGAL COMMENT 313, 344-45 (2003).

<sup>202</sup> See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 103 cmt. b (2001) ("A lawyer dealing with a sophisticated business person will have less need for caution than when dealing with an unsophisticated nonclient."); see Karcher, *supra* note 32, at 752.

<sup>203</sup> See N.C. 2004 Formal Ethics Op. No. 10 (2004) (buyer's lawyer in real estate closing may prepare deed for unrepresented seller as long as she explains to seller that she does not represent him and that in absence of contract specifications, lawyer will prepare deed that protects her client's interests).

<sup>204</sup> Engler, *supra* note 192, at 97.

other documents they prepare for the self-negotiating player to sign.<sup>205</sup> Nor may team counsel circumvent this prohibition by coaching other front office personnel to give advice to the player about the contract negotiation.<sup>206</sup> The risks for team counsel in this situation go beyond sanctions for unethical conduct and could include liability for a player's detrimental reliance on team counsel's statements.<sup>207</sup>

### C. Communicating with a Person Receiving Limited-Scope Legal Services

As for the third ethical minefield—communicating with a person receiving limited-scope legal services—team counsel are increasingly likely to encounter this risk as players combine self-negotiation with retention of hourly-rate attorneys for the purpose of delimited contract advice and review.<sup>208</sup> This type of “limited-scope representation,” countenanced by Model Rule 1.2(c),<sup>209</sup> may be invisible to team counsel because the player's attorney is operating behind the scenes or entered the picture only after contract negotiations are under way. Under these circumstances, team counsel may unwittingly violate Model Rule 4.2, known as the “no-contact” rule.<sup>210</sup> This rule prohibits a lawyer from communicating with an adverse party whom “the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer.”<sup>211</sup> On its face, the ban on contact only applies when a lawyer “knows” that the player is represented by counsel, but such knowledge “may be inferred from the circumstances.”<sup>212</sup> Thus, team counsel negotiating directly with a player runs the risk of violating Rule 4.2 if the player turns out to have a limited-scope lawyer in the background, advising on the contract negotiations.<sup>213</sup>

The American Bar Association ethics committee in 2015 issued a formal opinion in an attempt to clarify a lawyer's obligations in this

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<sup>205</sup> *Id.* at 87.

<sup>206</sup> See MODEL RULES, r. 8.4(a) (defining attorney misconduct as including using “another” to violate Rules).

<sup>207</sup> See generally Michael K. Abernathy, *Client or Adverse Party-Who Shall an Attorney Represent?: Duties Toward an Unrepresented Party in Transactions*, 19 J. LEGAL PROF. 337, 338-42 (1994) (unrepresented party may recover damages against an adverse attorney who engages in fraud or intentional deceit).

<sup>208</sup> See *supra* note 115 and accompanying text.

<sup>209</sup> MODEL RULES, r. 1.2(c).

<sup>210</sup> See ABA COMM. ON ETHICS & PROF'L RESPONSIBILITY, Formal Op. 472 (2015).

<sup>211</sup> MODEL RULES, r. 4.2.

<sup>212</sup> *Id.* at 4.2, cmt. 8.

<sup>213</sup> ABA COMM. ON ETHICS & PROF'L RESPONSIBILITY, Formal Op. 472 (2015).

setting.<sup>214</sup> Namely, the opinion addressed what a lawyer should do if she believes a self-represented person, adverse to her client, is receiving some assistance from a lawyer. May the suspecting lawyer continue to communicate directly with the person, or must she go through the person's lawyer? The committee acknowledged the "quandary" faced by a lawyer who believes she is dealing with a self-represented person, as the situation does not precisely align with either Rule 4.2's no-contact rule for parties who retain full-scope representation or Rule 4.3's defined-contact rule for the truly pro se party.<sup>215</sup> Therefore, the committee recommended that when a lawyer reasonably suspects the ostensibly self-represented person has received some degree of legal assistance in a matter, the lawyer has a duty to inquire whether that person has retained counsel.<sup>216</sup> In the transactional setting, suspicions may be triggered by documents that appear to be ghostwritten, such as "an agreement or a counteroffer that appears to have been prepared by a lawyer."<sup>217</sup>

The committee recommended that a suspecting lawyer's inquiry proceed in three steps. First, the lawyer should ask whether the person is represented by counsel for any portion of the matter, to determine whether to proceed under Rule 4.2 or 4.3.<sup>218</sup> If the person disclaims retaining counsel or discloses limited-scope representation and states that either it has concluded or it did not encompass the matter at hand, the lawyer may continue to communicate directly with the self-represented person.<sup>219</sup> For example, if the person responds that a limited-scope lawyer drafted a document, but is not providing any other representation, the inquiring lawyer is permitted to deal directly with the person under Rule 4.2 and must comport with the requirements of Rule 4.3.<sup>220</sup>

Second, if the person's response does not clearly insulate the inquiring lawyer from Rule 4.2 risk, the lawyer should reach out to opposing counsel to understand the scope of the representation and to determine the issues, if any, on which she may communicate directly with the person.<sup>221</sup> Assuming some degree of direct communication is permitted, the lawyer nonetheless must remain vigilant about the risk

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<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> ABA COMM. ON ETHICS & PROF'L RESPONSIBILITY, Formal Op. 472 (2015).  
at 8.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.* at 1.

of violating the “no-contact” rule.<sup>222</sup> At any point in the ongoing matter, if the lawyer suspects that the person has revived or expanded the limited-scope representation, the lawyer should take step three—once again inquiring about the involvement of counsel.<sup>223</sup> Unfortunately, this ABA guidance places all the burden on the suspecting lawyer to inquire and take care.<sup>224</sup>

For team counsel dealing with a self-negotiating player, the ABA’s interpretation of the “no-contact” rule recommends having an explicit conversation about what, if any, behind-the-scenes legal assistance is being provided to the player.<sup>225</sup> If team counsel learn at any point during the contract negotiation that the player has enlisted a lawyer’s help, counsel should postpone further conversation with the player about the contract until clarifying with the player’s lawyer exactly what may be communicated directly with the player.<sup>226</sup> Furthermore, a player’s limited-scope lawyer would serve her client and the negotiation process well by flagging these issues for the player and, at an appropriate time, reaching out to team counsel to affirmatively delineate the areas of permitted direct communication with the player.<sup>227</sup>

As suggested above, team counsel may attempt to avoid these ethical quandaries by nominating non-attorney front office personnel for the role of negotiating directly with a self-represented player.<sup>228</sup> However, even in this situation, team counsel may run afoul of the no-contact rule.<sup>229</sup> It is true that Rule 4.2 does not restrict parties—such as the team’s general manager and the player—from communicating with each other directly, even if they each have their own lawyers.<sup>230</sup> Furthermore, the ABA ethics committee has opined that the lawyers in this situation may advise their clients regarding the content of communications with each other, and may even draft “basic” documents for those communications.<sup>231</sup> However, those lawyers

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<sup>222</sup> *Id.* at 5–6.

<sup>223</sup> *Id.* at 6–7.

<sup>224</sup> ABA COMM. ON ETHICS & PROF’L RESPONSIBILITY, Formal Op. 472 (2015) at 6.

<sup>225</sup> *See id.* at 8.

<sup>226</sup> *See id.*

<sup>227</sup> *See id.* at 3.

<sup>228</sup> *See supra* notes 180 and 206 and accompanying text.

<sup>229</sup> *See* ILL. ETHICS OP. 04-02 (2005) (general counsel may not cause another corporate employee to communicate with a potential new hire directly while general counsel is negotiating employment contract with new hire’s lawyer).

<sup>230</sup> *See* ABA COMM. ON ETHICS & PROF’L RESPONSIBILITY, Formal Op. 461 (2011) (noting that parties in a transactional matter “have the right to communicate directly with each other”).

<sup>231</sup> *Id.* at 4.

must be careful not to “script the communication” or otherwise attempt to do, indirectly, what they are not permitted to do directly.<sup>232</sup> More precisely, the ABA ethics committee advises against a lawyer assisting her client “in securing from the represented person an enforceable obligation, disclosure of confidential information, or admissions against interest without the opportunity to seek the advice of counsel.”<sup>233</sup>

This guidance gives team counsel latitude to help prepare the general manager (or other front office personnel) to negotiate with the player, including reviewing documents for use in that negotiation. But, team counsel may not coach the general manager to induce the player to enter a contract without first consulting with his own counsel.<sup>234</sup> Again, faced with this slippery standard and an athlete who has retained a lawyer in connection with his player contract, team counsel may want to comport their conduct with Rule 4.2, even if they are not leading the negotiations with the player.

In sum, when an athlete represents himself or uses limited-scope legal services in a contract negotiation, lawyers on the other side of the table must be alert for potential ethical issues to avoid serious consequences for both counsel and clients.<sup>235</sup>

## V. RECONCEIVING THE VALUE OF SPORTS AGENTS

As more players choose to represent themselves in contract negotiations, or otherwise opt out of the traditional athlete-agent relationship, the sports agent business is headed for a crisis of confidence. Arguably, that crisis has already arrived with the widespread concern about agent competence, conflicts, and conduct.<sup>236</sup> It takes on new urgency, however, as athletes are questioning the very

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<sup>232</sup> See Annotated Model Rules, *supra* note 185 (listing cases); see ABA COMM. ON ETHICS & PROF’L RESPONSIBILITY, Formal Op. 461 (2011); MODEL RULES, r. 8.4(a) (lawyer may not induce another to violate the ethical rules on his behalf).

<sup>233</sup> See ABA COMM. ON ETHICS & PROF’L RESPONSIBILITY, Formal Op. 461 (2011).

<sup>234</sup> *Id.* at 5.

<sup>235</sup> Disciplinary authorities have full power to act in response as they deem warranted by the nature and extent of the violation, and routinely suspend and fine lawyers for violations of, for example, the no-contact rule. See, e.g., *In re Disciplinary Action Against Lucas*, 789 N.W.2d 73, 78 (N.D. 2010) (per curiam) (affirming 30-day suspension and fine against attorney who communicated directly with other party’s board of directors).

<sup>236</sup> See Karcher, *supra* note 32, at 739 (“[E]veryone, including players, heads of the players associations, and even many agents, universally agrees that such behavior is a problem.”); see Note, *Harvard or Hardball? An Examination of Ethical Issues Faced by Lawyer-Agents*, 21 SPORTS LAW. J. 45, 54 (2014) (noting “wide ranging and well-documented history of ‘agent abuse’”).

value proposition of using an agent in the setting of the player contract negotiation. As one commentator put it: “to bring down the pro sports agent house of cards, players need only to sincerely question ‘what are we getting for the percentage of gross compensation that we pay to our agents?’”<sup>237</sup> In the current environment of rookie pay scales, veteran maximums, and league-wide salary caps, the answer may well be to forgo a commission-based agent in favor of à la carte advice at an hourly rate.

Players will undoubtedly continue to rely on third parties, including sports agents, for a wide variety of services such as marketing and branding, investment advice and financial management, and tax and estate planning. But the core service offered by sports agents has always been the player contract negotiation.<sup>238</sup> To be fair, professional advice in this setting “usually pays off for major league athletes..., provided the advice comes from a competent, honest person.”<sup>239</sup> The question is how can sports agents make that advice pay off for both athletes and themselves in today’s sports economy? Further, how can athletes regain confidence in the integrity of their representatives?

Traditional sports agents need new strategies to deliver value in contract negotiations, rather than simply try to shore up existing business structures.<sup>240</sup> As the utility of middlemen shrinks in the information age, agents need to innovate to position themselves as more than “parasites.”<sup>241</sup> “Showing the money” alone is not enough in an era when CBAs circumscribe compensation and player salaries, and deal structures are widely disseminated on the Internet. Like other middlemen faced with technology’s disintermediation of their role, agents must differentiate and specialize.<sup>242</sup> As lawyers have already come to realize in other contexts, “clients who are not satisfied with professional services will seek other providers,” including representing

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<sup>237</sup> See Karcher, *supra* note 32, at 743.

<sup>238</sup> See *id.* at 740.

<sup>239</sup> See RUXIN, *supra* note 36, at 26.

<sup>240</sup> See Mike Florio, *Amid Talk of Players Not Using Agents, Rival Agents to Meet*, NBC SPORTS (July 23, 2015), <http://profootballtalk.nbcsports.com/2015/07/23/amid-talk-of-players-not-using-agents-rival-agents-to-meet/> (describing agents’ “aggressive effort” to resist NFLPA regulation and encouragement of player self-negotiation).

<sup>241</sup> See Evans, *supra* note 27, at 94.

<sup>242</sup> Gary A. Munneke, *Legal Skills for A Transforming Profession*, 22 PACE L. REV. 105, 111 (2001); see also Michele R. Pistone & John J. Hoeffner, *No Path but One: Law School Survival in an Age of Disruptive Technology*, 59 WAYNE L. REV. 193, 230-32 (2013) (observing that the illusion of “permanence” afflicts every generation and profession, including travel agents, record stores, and newspapers).

themselves pro se.<sup>243</sup>

Instead, agents should focus on generating distinctive tangible and intangible benefits for the athletes who rely on them to negotiate player contracts, for example, the advantages that arise from using a representative with a solid reputation and cooperative relationships with teams, and expertise as a seasoned negotiator who is familiar with CBA economics.<sup>244</sup> Agents also create value when serving as an “insulator” for the player, buffering him from the candor and hard bargaining that might damage his relationship with the team.<sup>245</sup> Agents should build on the widespread availability of data and the free resources provided by players associations to offer analytics expertise in contract negotiations.<sup>246</sup> Big data, investment in technology, and specialized analytical tools have transformed other facets of the sports industry, and could be equally applied to bolster player market values. Player and game performance analytics should not be the sole province of a team pursuing a winning record, but can also be deployed by an agent pursuing a lucrative contract on behalf of his client.

Most importantly, agents should experiment with alternative fee arrangements, setting fees that better correspond to the value of the services rendered and that are structured to avoid the conflicts of interest inherent in negotiating a contract that includes payments to the agent.<sup>247</sup> For contracts that award an agent a percentage off the top, agents should outsource the drafting and review process to an independent hourly lawyer, beholden only to the player.<sup>248</sup> This approach may shore up player confidence in agents by introducing transparency and proportionality to the methods by which agents are paid for their services.<sup>249</sup> Of course, these proposals largely skirt a critical problem in the sports agent business—solicitation of amateur

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<sup>243</sup> See Munneke, *supra* note 242 at 113.

<sup>244</sup> See SHROPSHIRE, *supra* note 10, at 23–24; Mike Florio, *Good Agents Do a Lot More Than Negotiate Contracts*, NBC SPORTS (July 23, 2015), <http://profootballtalk.nbcsports.com/2015/07/23/good-agents-do-a-lot-more-than-negotiate-contracts/>; Heitner, *supra* note 69.

<sup>245</sup> See generally MARINA KRAKOVSKY, *THE MIDDLEMAN ECONOMY: HOW BROKERS, AGENTS, DEALERS, AND EVERYDAY MATCHMAKERS CREATE VALUE AND PROFIT* 173–74 (2015) (describing agent Drew Rosenhaus as an insulator who protects players’ relationships with their teams); CARFAGNA, *supra* note 53, at 80–81.

<sup>246</sup> See Evans, *supra* note 27, at 98–99.

<sup>247</sup> See *id.*

<sup>248</sup> Any such arrangement would be subject to ethical rules regarding the professional independence of a lawyer and prohibitions on fee-sharing with nonlawyers. See MODEL RULES, r. 5.4.

<sup>249</sup> See Caudill, *supra* note 29, at 710.

athletes at risk of their NCAA eligibility.<sup>250</sup> The problems associated with overly aggressive recruitment of college athletes are beyond the scope of this article. However, many of those problems stem from an agent compensation system that incentivizes coercive tactics, improper inducements, and self-interest seeking.<sup>251</sup> Fixing this compensation system may realign the incentives and promote ethical representation where numerous efforts at regulation have thus far failed.<sup>252</sup>

Finally, agents should consider reforming their “babysitting” role to offer standardized “concierge” services that draw ethical lines and do not infantilize the athlete, while enabling him to focus on practicing, training, and competing in his sport.<sup>253</sup> Agents have already made headway in this area in terms of the services they offer to the pre-draft athlete, including preparing for workouts, mediating information about particular teams and their needs, and dealing with the media.<sup>254</sup> Some agencies already plug itemized categories of concierge services, including travel assistance, entertainment planning, and personal shopping.<sup>255</sup> Flexibility and transparency in their relationships with players will go a long way to restoring confidence in the sports agent business.

## VI. CONCLUSION

Trends in professional athletes representing themselves in player contract negotiations respond to and illuminate other developments in the sports industry, including increasing prosperity, evolving CBA frameworks, and concerns about sports agent ethics. While highly individualistic, players’ decisions to self-negotiate reveal recurring scenarios: the player with predictable market value; the rookie subject to a pay scale; and the free agent who wants to stay in place as he returns from injury, winds down his career, believes he can factor into a winning season, or simply feels loyalty to a team that has treated him well. Whether or not the paradigm of the sports-agent-led negotiation is shifting, increasing player self-negotiation is a harbinger of the need for some self-correction in the sports agent business. Meanwhile, other service providers, including hourly-rate lawyers, ancillary professions and firms, and the players’ own unions, are viewing the situation opportunistically and experimenting with new service

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<sup>250</sup> See Karcher, *supra* note 32, at 762.

<sup>251</sup> See *id.* at 750.

<sup>252</sup> See SPARTA, *supra* note 31 and accompanying text.

<sup>253</sup> See KRAKOVSKY, *supra* note 245, at 146; *supra* text accompanying note 130.

<sup>254</sup> See Wong, *supra* note 176, at 571; Geisel, *supra* note 131, at 228.

<sup>255</sup> See, e.g., LMM SPORTS MANAGEMENT LLC, <http://www.lmmsports.com/services/concierge-services/> (last visited May 15, 2016).



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models. Athletes navigating this new terrain should seek a service model that is cost-effective and reinforces their authority as principal in the agency relationship.

At the same time, leagues, teams, and their lawyers who find themselves negotiating with self-represented athletes must tread carefully to avoid ethical minefields and preserve goodwill with their most important asset—the players who populate their sport. Ambiguity about whether the self-negotiating player has retained any legal services poses the biggest ethical risk to team counsel: violating the no-contact rule. Also present is the risk of providing impermissible legal advice to the truly lawyer-less player, especially if that player does not grasp that the team's lawyer is not disinterested. Team counsel should be explicit in describing their role to self-negotiating players, and vigilant about the background presence of an attorney, to avoid pro se remorse and accusations of unconscionability and ethical breach.

At best, this article will encourage sports agents to use the conversation about athlete self-negotiation to reinvent their role in a direction that not only creates value for players, but also incentivizes good behavior across the business.

